THE JOURNAL OF THE FEDERAL CONVENTION OF 1787 ANALYZED; THE ACTS AND PROCEEDINGS THEREOF COMPARED; AND THEIR PRECEDENTS CITED: IN EVIDENCE OF THE MAKING OF THE CONSTITUTION FOR INTERPRETATION OR CONSTRUCTION IN THE ALTERNATIVE, ACCORDING TO EITHER THE FEDERAL PLAN OR THE NATIONAL PLAN: THAT BY THE LATTER CONGRESS HAVE GENERAL POWER TO PROVIDE FOR THE COMMON DEFENSE AND GENERAL WELFARE OF THE UNITED STATES; DIRECT TAXES ARE TAXES DIRECT TO THE SEVERAL STATES, IN CONTRAST WITH DUTIES EXTENDING THROUGHOUT THE UNITED STATES, WHICH ARE INDIRECT TAXES TO THE SEVERAL STATES; AND THE LIMITS OF THE UNION ARE COEXTENSIVE WITH THE BOUNDS OF AMERICA.

BY

HAMILTON P. RICHARDSON, ESQ.,

OF THE WISCONSIN BAR.

SAN FRANCISCO:
THE MURDOCK PRESS.
1899

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INTRODUCTORY.

From the Journal, Acts and Proceedings of the Convention assembled at Philadelphia, Monday, May 14, and dissolved Monday, September 17, 1787, which formed the Constitution of the United States; published under the direction of the President of the United States, conformably to a resolution of Congress of March 27, 1818; published 1819, Boston, Thomas B. Wait; reprinted in Elliot's Debates, Volume I, J. B. Lippincott Co.'s Edition, 1896.

"ADVERTISEMENT.

"The following resolution of the old Congress, adopted on the 21st of February, 1787, contains the authority by which the Convention, which formed the constitution was convoked: Whereas there is provision of the articles of confederation and perpetual union for making alterations therein by the assent of the congress of the United States, and of the legislatures of the several states; and whereas experience hath evinced that there are defects in the present confederation, as a mean to remedy which several of the states and particularly the state of New York by express instructions to their delegates in Congress, have suggested a Convention for the purposes expressed in the following resolution; and such convention appearing to be the most probable mean of establishing in these states a firm national government,

"'*Resolved*, That in the opinion of Congress it is expedient that on the second Monday in May next a convention of delegates who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the articles of confederation and reporting to congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress and confirmed by the sev-

eral states render the federal constitution adequate to the exigencies of government and the preservation of the Union.

"The day appointed by this resolution for the meeting of the convention was the second Monday in May, 1787, but the 25th of that month was the first day upon which a sufficient number of members appeared to constitute a representation of a majority of the states. They then elected George Washington their president, and proceeded to business, at the city of Philadelphia.

"On the 29th of May, Mr. Edmund Randolph presented to the convention fifteen resolutions, and Mr. C. Pinckney laid before them the draft of a federal government, which were referred to a committee of the whole; which debated the resolutions from day to day until the 13th of June, when the committee of the whole reported to the Convention a series of nineteen resolutions, founded upon those which had been proposed by Mr. Randolph. On the 15th of June, Mr. Patterson submitted to the Convention his resolutions, which were referred to a committee of the whole, to whom were also recommitted the resolutions reported by them on the 13th. On the 19th of June, the committee of the whole reported that they did not agree to Mr. Patterson's propositions, but reported again the resolutions which had been reported before.

"The Convention never afterwards went into committee of the whole; but from the 19th of June till the 23d of July, were employed in debating the nineteen resolutions reported by the committee of the whole on the 13th of June, some of which were occasionally referred to grand committees of one member from each state, or to select committees of five members. After passing upon the nineteen resolutions, it was on the 23d of July resolved, 'That the proceedings of the Convention for the establishment of a national government, except what respects the supreme executive, be referred to a committee for the purpose of reporting a constitution conformably to the proceedings aforesaid.' This committee, consisting of five members, and called in the Journal, "the committee of detail," was appointed on the 24th of July, and, with the proceedings of the Convention, the propositions submitted to the Convention by Mr. Charles Pinckney on the 29th of May, and by Mr. Patterson on the 15th of June, were referred to them. On the 26th of July, a resolution respecting the executive and two others, offered for the consideration of the Convention, were referred to the committee of detail; and the Convention adjourned till Monday the 6th of August, when the committee reported a Constitution for the establishment of a national government.

"This draft formed the general text of debate from that time till the 8th of September; many additional resolutions being in the course of the deliberations proposed, and referred to and reported upon by the same committee of detail, or other committees of eleven, (a member from each state,) or of five. On the 8th of September, a committee of five was appointed 'to revise the style of and arrange the articles agreed to by the house.' On the 12th of September, this committee reported the Constitution, as revised and arranged, and the draft of a letter to Congress. It was ordered that printed copies of the reported Constitution should be furnished to the members and they were brought in the next day.

"On the 17th day of September, 1787, the Convention dissolved itself, by an adjournment without day, after transmitting the plan of the Constitution, which they had prepared, to Congress, to be laid before conventions, delegated by the people of the several states, for their assent and ratification.

The last act of the Convention was a resolution that their journal and other papers should be deposited with their president, to be retained by him, subject to the order of the Congress, if ever formed under the Constitution.

. . . . . .

"In order to follow with clear understanding the course of the proceedings of the Convention, particular attention is required to the following papers, which, except the third, successively formed the general text of their debates:—

"1. May 29, 1787. The Fifteen Resolutions offered by Mr. Edmund Randolph to the Convention, and by them referred to a committee of the whole.

"2. June 13. Nineteen Resolutions reported by this committee of the whole, on the 13th, and again on the 19th of June, to the Convention.

"3. July 26. Twenty-three Resolutions, adopted and elaborated by the Convention, in debate upon the above nineteen, reported from the committee of the whole; and on the 23d and 26th of July, referred, together with the plan of Mr. C. Pinckney, and the propositions of Mr. Patterson to a committee of five, to report a draft of a Constitution.

"4. August 6. The Draft of a Plan of a Constitution, reported by this committee to the Convention, and debated from that time till the 12th of September.

"5. September 13. Plan of a Constitution, brought in by a committee of revision appointed on the 8th of September,

consisting of five members, to revise the style of and arrange the articles agreed to by the Convention.

"The second and fourth of these papers are among those deposited by President Washington, at the department of State.[1]

"The first, fourth, and fifth, are among those transmitted by General Bloomfield.[2]

"The third is collected from the proceedings of the Convention, as they are spread over the Journal from June 19th to July 26th.

"This paper, together with the plan of Mr. C. Pinckney, a copy of which has been furnished by him, and the propositions of Mr. Patterson, included among the papers forwarded by General Bloomfield, comprise the materials upon which the first draft was made of the Constitution, as reported by the committee of detail, on the 6th of August."

PART I.

THE PURPOSE.

It is designed here to present an analysis and comparison of the afore-mentioned papers—that is to say, the resolutions offered by Mr. Randolph of Virginia, May 29, which were commonly called in the convention the Virginia plan of government, the resolutions of the convention reported from the committee of the whole house twice, first on June 13, and again (after rejection of the Jersey plan) on June 19, the resolutions of the convention sitting in convention, referred on July 23—26 to a committee of detail to draft a Constitution, the rough draft of the Constitution reported from the committee of detail August 6, and the revised and ar-

[1] In 1796.

[2] General Bloomfield was the executor of David Brearly, one of the members of the Convention.

ranged draft also reported from committee appointed to revise the style of and arrange the articles agreed to by the house, September 12 ; also the resolutions offered by Mr. Patterson of New Jersey, June 15, which were commonly called in the convention the Jersey plan of government, and the draft of a government offered to the convention by Mr. Charles Pinckney, May 29. It is intended to notice the likenesses and differences of these papers and to set forth the sources and precedents of the respective proceedings, resolutions and clauses, articles and sections therein contained, whereby their meaning may be more clear. For this purpose all the papers are divided into two sets, those which were under consideration by the convention prior to July 26, when the resolutions finally adopted by the convention were referred to the committee of detail to draft a Constitution conformable to those resolutions, and those under consideration subsequent to August 6, when the committee of detail made their report; that is to say, the papers are divided into those which present the constitution in block or in mass, as it were, and those which present it in detail. The first set, being (1) the Virginia plan of government, (2) the resolutions reported by the committee of the whole house on June 13 and again on June 19, (3) the Jersey plan of government, (4) the resolutions of the convention sitting in convention, are here set out from the Journal. They will be compared throughout by first comparing the Virginia plan, the resolutions reported from the committee of the whole and the resolutions of the convention in convention ; and then comparing the latter, that is the resolutions finally adopted by the convention, with the Jersey plan, which was rejected by the convention. For reference throughout, the Articles of Confederation and Perpetual Union are set out first.

ARTICLES OF CONFEDERATION AND PERPETUAL UNION.

WHEREAS the delegates of the United States of America, in Congress assembled, did, on the fifteenth day of November, in the year of our Lord one thousand seven hundred and seventy-seven, and in the second year of the Independence of America, agree to certain Articles of Confederation and Perpetual Union, between the states of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, in the words following, viz:—

Articles of Confederation and Perpetual Union, between the States of New Hampshire, Massachusetts Bay, Rhode Island, and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

ARTICLE 1. The style of this confederacy shall be, 'The United States of America.'

ART. 2. Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation, expressly delegated to the United States in Congress assembled.

ART. 3. The said states hereby severally enter into a firm league of friendship with each other for their common defence, the security of their liberties, and their mutual and general welfare; binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

ART. 4. The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union, the free inhabitants of each of these states—paupers, vagabonds, and fugitives from justice excepted—shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof, respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any state from any other other state, of which the owner is an inhabitant; provided also, that no imposition, duty, or restriction, shall be laid

by any state on the property of the United States, or either of them.

If any person, guilty of, or charged with, treason, felony, or other high misdemeanor, in any state, shall flee from justice, and be found in any of the United States, he shall, upon demand of the governor or executive power of the state from which he fled, be delivered up, and removed to the state having jurisdiction of his offence.

Full faith and credit shall be given, in each of these states, to the records, acts, and judicial proceedings, of the courts and magistrates of every other state.

Art. 5. For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each state shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each state, to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year.

No state shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit, receives any salary, fees, or emolument of any kind.

Each state shall maintain its own delegates in a meeting of the states, and while they act as members of the committee of the states.

In determining questions in the United States in Congress assembled, each state shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress; and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on, Congress, except for treason, felony, or breach of the peace.

Art. 6. No state, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty, with any king, prince, or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more states shall enter into any treaty, confederation, or alliance whatever between them, without the con-

sent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No state shall lay any imposts or duties, which may interfere with any stipulations in treaties entered into, by the United States in Congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by Congress to the courts of France and Spain.

No vessel of war shall be kept up in time of peace by any state, except such number only as shall be deemed necessary, by the United States in Congress assembled, for the defence of such state, or its trade; nor shall any body of forces be kept up by any state, in time of peace, except such number only as, in the judgment of the United States in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such state; but every state shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutred and shall provide, and have constantly ready for use, in public stores, a due number of field-pieces and tents, and a proper quantity of arms, ammunition, and camp equipage.

No state shall engage in any war without the consent of the United States in Congress assembled, unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted; nor shall any state grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state, and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such state be infested by pirates; in which case, vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

Art. 7. When land forces are raised by any state for the common defence, all officers of or under the rank of colonel shall be appointed by the legislature of each state, respectively, by whom such forces shall be raised, or in such manner as such state shall direct; and all vacancies shall be filled up by the state which first made the appointment.

Art. 8. All charges of war, and all other expenses that shall be incurred for the common defence or general welfare,

and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land, within each state, granted to or surveyed for any person, as such land, and the buildings and improvements thereon, shall be estimated, according to such mode as the United States in Congress assembled shall, from time to time, direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states, within the time agreed upon by the United States in Congress assembled.

Art. 9. The United States in Congress assembled shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances; provided that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever—of establishing rules for deciding, in all cases, what captures, on land or water, shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—appointing courts for the trial of piracies, and felonies committed on the high seas, and establishing courts for receiving and determining finally appeals in all cases of capture; provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise, between two or more states, concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following: Whenever the legislative or executive authority, or lawful agent, of any state in controversy with another, shall present a petition to Congress, stating the matter in question, and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other state in controversy, and a day assigned for the appearances of the parties, by their lawful agents,—who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree,

Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges, who shall hear the cause, shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each state, and the secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court, to be appointed in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence or judgment, which shall, in like manner, be final and decisive,—the judgment or sentence, and other proceedings, being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned; provided that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the supreme or superior court of the state, where the cause shall be tried, "*well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward:*" provided, also, that no state shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil, claimed under different grants of two or more states, whose jurisdiction, as they may respect such lands, and the states which passed such grants, are adjusted, the said grants, or either of them, being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the Congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different states.

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states; fixing the standard of weights and

measures throughout the United States; regulating the trade and managing all affairs with the Indians not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated; establishing and regulating post-offices from one state to another throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office; appointing all officers of the land forces in the service of the United States, excepting regimental officers; appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States; making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee to sit in the recess of Congress, to be denominated "a committee of the states," and to consist of one delegate from each state; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction—to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years—to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses—to borrow money or emit bills on the credit of the United States, transmitting, every half year, to the respective states, an account of the sums of money so borrowed or emitted—to build and equip a navy—to agree upon the number of land forces, and to make requisitions from each state for its quota, in proportion to the number of white inhabitants in such state; which requisitions shall be binding; and thereupon the legislature of each state shall appoint the regimental officers, raise the men, and clothe, arm, and equip them in a soldier-like manner, at the expense of the United States; and the officers and men so clothed, armed, and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled; but if the United States in Congress assembled shall, on consideration of circumstances, judge proper that any state should not raise men, or should raise a smaller number than its quota, and that any other state should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, clothed, armed, and equipped, in the same manner, as the quota of such state, unless the legislature of such state shall judge that such extra number cannot be

safely spared out of the same; in which case they shall raise, officer, clothe, arm, and equip, as many of such extra number as they judge can be safely spared. And the officers and men so clothed, armed, and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war; nor grant letters of marque and reprisal in time of peace; nor enter into any treaties or alliances; nor coin money; not regulate the value thereof; nor ascertain the sums and expenses necessary for the defence and welfare of the United States, or any of them; nor emit bills; nor borrow money on the credit of the United States; nor appropriate money; nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised; nor appoint a commander-in-chief of the army or navy,—unless nine states assent to the same; nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months; and shall publish the journal of their proceedings monthly, except such parts thereof, relating to treaties, alliances, or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each state on any question shall be entered on the journal, when it is desired by any delegate; and the delegates of a state, or any of them, at his or their request, shall be furnished with a transcript of the said journal, except such parts as are above execpted, to lay before the legislatures of the several states.

Art. 10. The committee of the states, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine states, shall, from time to time, think expedient to vest them with; provided that no power be delegated to the said committee for the exercise of which, by the Articles of Confederation, the voice of nine states in the Congress of the United States assembled is requisite.

Art. 11. Canada, acceding to this Confederation, and joining in the measures of the United States, shall be admitted into, and entitled to, all the advantages of this union; but no other colony shall be admitted into the same unless such admission be agreed to by nine states.

ART. 12. All bills of credit emitted, moneys borrowed, and debts contracted, by or under the authority of Congress, before the assembling of the United States in pursuance of the present Confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith, are hereby solemnly pledged.

ART. 13. Every state shall abide by the determination of the United States in Congress assembled, on all questions which, by this Confederation, are submitted to them. And the articles of this Confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration, at any time hereafter, be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislature of every state.

RATIFICATION.

And whereas it has pleased the Great Governor of the world to incline the hearts of the legislatures we respectively represent in Congress, to approve of and to authorize us to ratify the said Articles of Confederation and Perpetual Union: *Know ye,* That we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do, by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and Perpetual Union, and all and singular the matters and things therein contained; and we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States in Congress assembled, on all questions which, by the said Confederation, are submitted to them; and that the articles thereof shall be inviolably observed by the states we respectively represent; and that the union shall be perpetual.

In witness whereof, we have hereunto set our hands, in Congress. Done at Philadelphia, in the state of Pennsylvania, the ninth day of July, in the year of our Lord one thousand seven hundred and seventy-eight, and in the third year of the Independence of America.

RESOLUTIONS OFFERED BY MR. EDMUND RANDOLPH TO THE CONVENTION, MAY 29, 1787.[1]

"1. *Resolved*, That the Articles of the Confederation ought to be so corrected and enlarged as to accomplish the objects proposed by their institution; namely, common defence, security of liberty, and general welfare.

"2. *Resolved*, therefore, That the right of suffrage, in the national legislature, ought to be proportioned to the quotas of contribution, or to the number of free inhabitants, as the one or the other may seem best, in different cases.

"3. *Resolved*, That the national legislature ought to consist of two branches.

"4. *Resolved*, That the members of the first branch of national legislature ought to be elected by the people of the several states every , for the term of , to be of the age of years, at least; to receive liberal stipends, by which they may be compensated for the devotion of their time to the public service; to be ineligible to any office established by a particular state, or under the authority of the United States, (except those peculiarly belonging to the functions of the first branch,) during the term of service and for the space of after its expiration; to be incapable of reëlection for the space of after the expiration of their term of service; and to be subject to recall.

"5. *Resolved*, That the members of the second branch of the national legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual legislatures, to be of the age of years, at least; to hold their offices for a term sufficient to insure their independency; to receive liberal stipends, by which they may be compensated for the devotion of their time to the public service; and to be ineligible to any office established by a particular state or under the authority of the United States, (except those particularly belonging to the functions of the second branch,) during the term of service; and for the space of after the expiration thereof.

"6. *Resolved*, That each branch ought to possess the right of originating acts; that the national legislature ought to be empowered to enjoy the legislative right vested in Congress by the Confederation; and, moreover, to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by

[1] Paper furnished by General Bloomfield.

the several states, contravening, in the opinion of the national legislature, the articles of union, or any treaty subsisting under the authority of the Union; and to call forth the force of the Union against any member of the Union failing to fulfil its duty under the articles thereof.

"7. *Resolved*, That a national executive be instituted, to be chosen by the national legislature for the term of years, to receive punctually, at stated times, a fixed compensation for the services rendered, in which no increase or diminution shall be made, so as to affect the magistracy existing at the time of the increase or diminution; to be ineligible a second time; and that, besides a general authority to execute the national laws, it ought to enjoy the executive rights vested in Congress by the Confederation.

"8. *Resolved*, That the executive, and a convenient number of the national judiciary, ought to compose a council of revision, with authority to examine every act of the national legislature, before it shall operate, and every act of a particular legislature, before a negative thereon shall be final; and that the dissent of the said council shall amount to a rejection, unless the act of the national legislature be again passed, or that of a particular legislature be again negatived by of the members of each branch.

"9. *Resolved*, That a national judiciary be established to hold their offices during good behavior, and to receive punctually, at stated times, a fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution. That the jurisdiction of the inferior tribunals shall be to hear and determine in the first instance, and of the supreme tribunal to hear and determine in the *dernier ressort*, all piracies and felonies on the seas; captures from an enemy; cases in which foreigners, or citizens of other states, applying to such jurisdictions, may be interested, or which respect the collection of the national revenue; impeachments of any national officer; and questions which involve the national peace or harmony.

"10. *Resolved*, That provision ought to be made for the admission of states, lawfully arising within the limits of the United States, whether from a voluntary junction of government or territory, or otherwise, with the consent of a number of voices in the national legislature less than the whole.

"11. *Resolved*, That a republican government, and the territory of each state, (except in the instance of a voluntary junction of government and territory,) ought to be guaranteed by the United States to each state.

"12. *Resolved*, That provision ought to be made for the continuance of Congress, and their authorities and privileges, until a given day, after the reform of the articles of union shall be adopted, and for the completion of all their engagements.

"13. *Resolved*, That provision ought to be made for the amendment of the articles of union, whensoever it shall seem necessary; and that the assent of the national legislature ought not to be required thereto.

"14. *Resolved*, That the legislative, executive, and judiciary powers within the several states ought to be bound by oath to support the articles of union.

"15. *Resolved*, That the amendments, which shall be offered to the Confederation by the Convention, ought, at a proper time or times, after the approbation of Congress, to be submitted to an assembly or assemblies of representatives, recommended by the several legislatures, to be expressly chosen by the people to consider and decide thereon.

"16. *Resolved*, That the house will to-morrow resolve itself into a committee of the whole house, to consider of the state of the American Union."

STATE OF THE RESOLUTIONS SUBMITTED TO THE CONSIDERATION OF THE HOUSE BY THE HON. MR. RANDOLPH.

AS ALTERED, AMENDED AND AGREED TO, IN COMMITTEE OF THE WHOLE HOUSE.

[Paper deposited by President Washington, in the Department of State.]

"1. *Resolved*, That it is the opinion of this committee that a national government ought to be established, consisting of a supreme legislative, judiciary and executive.

"2. *Resolved*, That the national legislature ought to consist of two branches.

"3. *Resolved*, That the members of the first branch of the national legislature ought to be elected by the people of the several states, for the term of three years; to receive fixed stipends, by which they may be compensated for the devotion of their time to public service, to be paid out of the national treasury; to be ineligible to any office established by a particular state, or under the authority of the United States, (except those peculiarly belonging to the functions of the first branch,) during the term of service, and under the national government, for the space of one year after its expiration.

"4. *Resolved*, That the members of the second branch of the national legislature ought to be chosen by the individual legislatures; to be of the age of thirty years, at least; to hold their offices for a term sufficient to insure their independency—namely, seven years; to receive fixed stipends, by which they may be compensated for the devotion of their time to public service, to be paid out of the national treasury; to be ineligible to any office established by a particular state, or under the authority of the United States, (except those peculiarly belonging to the functions of the second branch,) during the term of service, and under the national government, for the space of one year after its expiration.

"5. *Resolved*, That each branch ought to possess the right of originating acts.

"6. *Resolved*, That the national legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation; and, moreover, to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several states contravening, in the opinion of the national legislature, the articles of union, or any treaties subsisting under the authority of the Union.

"7. *Resolved*, That the right of suffrage in the first branch of the national legislature ought not to be according to the rule established in the Articles of Confederation, but according to some equitable ratio of representation; namely, in proportion to the whole number of white and other free citizens, and inhabitants of every age, sex, and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes, in each state.

"8. *Resolved*, That the rights of suffrage in the second branch of the national legislature ought to be according to the rule established for the first.

"9. *Resolved*, That a national executive be instituted, to consist of a single person; to be chosen by the national legislature, for the term of seven years; with power to carry into execution the national laws; to appoint to offices in cases not otherwise provided for; to be ineligible a second time; and to be removable on impeachment and conviction of malpractice, or neglect of duty; to receive a fixed stipend, by which he may be compensated for the devotion of his time to public service, to be paid out of the national treasury.

"10. *Resolved*, That the national executive shall have a right to negative any legislative act, which shall not be afterwards passed unless by two third parts of each branch of the national legislature.

"11. *Resolved*, That a national judiciary be established, to consist of one supreme tribunal; the judges of which to be appointed by the second branch of the national legislature; to hold their offices during good behavior; to receive punctually, at stated times, a fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution.

"12. *Resolved*, That the national legislature be empowered to appoint inferior tribunals.

"13. *Resolved*, That the jurisdiction of the national judiciary shall extend to cases which respect the collection of the national revenue, impeachment of any national officers, and questions which involve the national peace and harmony.

"14. *Resolved*, That provision ought to be made for the admission of states, lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory, or otherwise, with the consent of a number of voices in the national legislature less than the whole.

"15. *Resolved*, That provision ought to be made for the continuance of Congress, and their authorities, until a given

day after the reform of the articles of union shall be adopted, and for the completion of all their engagements.

"16. *Resolved*, That a republican constitution, and its existing laws, ought to be guaranteed to each state by the United States.

"17. *Resolved*, That provision ought to be made for the amendment of the articles of union whensoever it shall seem necessary.

"18. *Resolved*, That the legislative, executive, and judiciary powers within the several states ought to be bound by oath, to support the articles of union.

"19. *Resolved*, That the amendments, which shall be offered to the Confederation by the Convention, ought, at a proper time or times after the approbation of Congress, to be submitted to an assembly, or assemblies of representatives, recommended by the several legislatures to be expressly chosen by the people to consider and decide thereon."

PROPOSITIONS OFFERED TO THE CONVENTION BY THE HON. MR. PATTERSON, JUNE 15, 1787.

[Paper furnished by General Bloomfield.]

"1. *Resolved*, That the Articles of Confederation ought to be revised, corrected, and enlarged, so as to render the Federal Constitution adequate to the exigencies of government, and the preservation of the Union.

"2. *Resolved*, That, in addition to the powers vested in the United States in Congress, by the present existing Articles of Confederation, they be authorized to pass acts for raising a revenue, by levying a duty or duties on all goods and merchandise of foreign growth or manufacture, imported into any part of the United States; by stamps on paper, vellum, or parchment; and by a postage on all letters and packages passing through the general post-office—to be applied to such federal purposes as they shall deem proper and expedient; to make rules and regulations for the collection thereof; and the same from time to time to alter and amend, in such manner as they shall think proper. To pass acts for the regulation of trade and commerce, as well with foreign nations as with each other; provided, that all punishments, fines, forfeitures, and penalties, to be incurred for contravening such rules and regulations, shall be adjudged by the common-law judiciary of the states in which any offence contrary to the true intent and meaning of such rules and regulations shall be committed or perpetrated; with liberty of commencing, in the first instance, all suits or prosecutions for that purpose in the superior common-law judiciary of such state; subject, nevertheless, to an appeal for the correction of all errors both in law and fact, in rendering judgment, to the judiciary of the United States.

"3. *Resolved*, That, whenever requisitions shall be necessary, instead of the present rules, the United States in Congress be authorized to make such requisitions in proportion to the whole number of white and other free citizens and inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes; that, if such requisitions be not complied with in the time to be specified therein, to direct the collection thereof in the non-complying states; and for that purpose to devise and pass acts directing and authorizing the same; provided, that none of the powers hereby vested in the United States in Congress shall be exercised without the

consent of at least states; and in that proportion, if the number of confederated states should be hereafter increased or diminished.

"4. *Resolved*, That the United States in Congress be authorized to elect a federal executive to consist of persons, to continue in office for the term of years; to receive punctually, at stated times, a fixed compensation for the services by them rendered, in which no increase or diminution shall be made, so as to affect the persons composing the executive at the time of such increase or diminution; to be paid out of the federal treasury; to be incapable of holding any other office or appointment during their time of service, and for years thereafter; to be ineligible a second time, and removable on impeachment and conviction for malpractices or neglect of duty, by Congress, on application by a majority of the executives of the several states. That the executive, besides a general authority to execute the federal acts, ought to appoint all federal officers not otherwise provided for, and to direct all military operations; provided, that none of the persons composing the federal executive shall, on any occasion, take command of any troops, so as personally to conduct any military enterprise as general, or in any other capacity.

"5. *Resolved*, That a federal judiciary be established, to consist of a supreme tribunal, the judges of which to be appointed by the executive, and to hold their offices during good behavior; to receive punctually, at stated times, a fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution. That the judiciary, so established, shall have authority to hear and determine, in the first instance, on all impeachments of federal officers; and by way of appeal, in the *dernier ressort*, in all cases touching the rights and privileges of ambassadors; in all cases of captures from an enemy; in all cases of piracies and felonies on the high seas; in all cases in which foreigners may be interested, in the construction of any treaty or treaties, or which may arise on any act or ordinance of Congress for the regulation of trade, or the collection of the federal revenue. That none of the judiciary officers shall, during the time they remain in office, be capable of receiving or holding any other office or appointment during their term of service, or for thereafter.

"6. *Resolved*, That the legislative, executive, and judiciary powers, within the several states, ought to be bound, by oath, to support the articles of union.

" 7. *Resolved*, That all acts of the United States in Congress assembled, made by virtue and in pursuance of the powers hereby vested in them, and by the Articles of Confederation, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective states as far as those acts or treaties shall relate to the said states, or their citizens; and that the judiciaries of the several states shall be bound thereby in their decisions, any thing in the respective laws of the individual states to the contrary notwithstanding.

" And if any state, or any body of men in any state, shall oppose or prevent the carrying into execution such acts or treaties, the federal executive shall be authorized to call forth the powers of the confederated states, or so much thereof as may be necessary, to enforce and compel an obedience to such acts, or an observance of such treaties.

" 8. *Resolved*, That provision ought to be made for the admission of new states into the Union.

" 9. *Resolved*, That provision ought to be made for hearing and deciding upon all disputes arising between the United States and an individual state, respecting territory.

" 10. *Resolved*, That the rule for naturalization ought to be the same in every state.

" 11. *Resolved*, That a citizen of one state, committing an offence in another state, shall be deemed guilty of the same offence as if it had been committed by a citizen of the state in which the offence was committed."

RESOLUTIONS OF THE CONVENTION.

REFERRED, ON THE TWENTY-THIRD AND TWENTY-SIXTH OF JULY, 1787, TO A COMMITTEE OF DETAIL, [MESSRS. RUTLEDGE, RANDOLPH, GORHAM, ELLSWORTH, AND WILSON,] FOR THE PURPOSE OF REPORTING A CONSTITUTION.

June 20. "I. *Resolved*, That the government of the United States ought to consist of a supreme legislative, judiciary, and executive.

"II. *Resolved*, That the legislature consist of two branches.

21. "III. *Resolved*, That the members of the first branch of the legislature ought to be elected by the people of 22. the several states, for the term of two years; to be 23. paid out of the public treasury; to receive an adequate compensation for their services; to be of the age of twenty-five years at least; to be ineligible to, and incapable of holding, any office under the authority of the United States, (except those peculiarly belonging to the functions of the first branch,) during the term of service of the first branch.

25. "IV. *Resolved*, That the members of the second branch of the legislature of the United States ought to be chosen by the individual legislatures; to be of the age of thirty years at least; to hold their offices for six years, one third to go out biennially; to receive a compensation for the devotion of their time to the public service; to be ineligible to, and incapable of holding, any office under the authority of the United States, (except those peculiarly belonging to the functions of the second branch,) during the term for which they are elected, and for one year thereafter.

"V. *Resolved*, That each branch ought to possess the right of originating acts.

Postponed, 27. "VI. *Resolved*, That the national legislature July 16. ought to possess the legislative rights vested in Congress by the Confederation; and moreover, to legislate, in all cases, for the general interests of the Union, and 17. also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.

"VII. *Resolved*, That the legislative acts of the United States, made by virtue, and in pursuance, of the articles of union, and all treaties made and ratified

under the authority of the United States, shall be the supreme law of the respective states, as far as those acts or treaties shall relate to the said states, or their citizens and inhabitants; and that the judiciaries of the several states shall be bound thereby in their decisions, any thing in the respective laws of the individual states to the contrary notwithstanding.

July 16. "VIII. *Resolved*, That, in the original formation of the legislature of the United States, the first branch thereof shall consist of sixty-five members, of which number

New Hampshire shall send 3	Delaware shall send 1
Massachusetts..... 8	Maryland 6
Rhode Island 1	Virginia 10
Connecticut..... 5	North Carolina 5
New York 6	South Carolina 5
New Jersey..... 4	Georgia 3
Pennsylvania..... 8	

But as the present situation of the states may probably alter in the number of their inhabitants, the legislature of the United States shall be authorized, from time to time, to apportion the number of representatives; and in case any of the states shall hereafter be divided, or enlarged by addition of territory, or any two or more states united, or any new states created within the limits of the United States, the legislature of the United States shall possess authority to regulate the number of representatives, in any of the foregoing cases, upon the principle of their number of inhabitants, according to the provisions hereafter mentioned, namely:—*Provided always*, that representation ought to be proportioned according to direct taxation. And in order to ascertain the alteration in the direct taxation which may be required, from time to time, by the changes in the relative circumstances of the states,—

"IX. *Resolved*, That a census be taken within six years from the first meeting of the legislature of the United States, and once within the term of every ten years afterwards, of all the inhabitants of the United States, in the manner and according to the ratio recommended by Congress in their resolution of April 18, 1783; and that the legislature of the United States shall proportion the direct taxation accordingly.

"X. *Resolved*, That all bills for raising or appropriating money, and for fixing the salaries of the officers of the government of the United States, shall originate in the first branch of the legislature of the United

July 16. States, and shall not be altered or amended by the second branch; and that no money shall be drawn from the public treasury but in pursuance of appropriations to be originated by the first branch.

"XI. *Resolved*, That, in the second branch of the legislature of the United States, each state shall have an equal vote.

26. "XII. *Resolved*, That a national executive be instituted, to consist of a single person, to be chosen by the national legislature for the term of seven years; to be ineligible a second time; with power to carry into execution the national laws; to appoint to offices in cases not otherwise provided for; to be removable on impeachment and conviction of malpractice or neglect of duty; to receive a fixed compensation for the devotion of his time to public service, to be paid out of the public treasury.

21. "XIII. *Resolved*. That the national executive shall have a right to negative any legislative act, which shall not be afterwards passed unless by two third parts of each branch of the national legislature.

18. "XIV. *Resolved*, That a national judiciary be established, to consist of one supreme tribunal, the judges
21. of which shall be appointed by the second branch of the national legislature; to hold their offices during good
18. behavior; to receive punctually, at stated times, a fixed compensation for their services, in which no diminution shall be made, so as to affect the persons actually in office at the time of such diminution.

"XV. *Resolved*, That the national legislature be empowered to appoint inferior tribunals.

18. "XVI. *Resolved*, That the jurisdiction of the national judiciary shall extend to cases arising under laws passed by the general legislature, and to such other questions as involve the national peace and harmony.

"XVII. *Resolved*, That provision ought to be made for the admission of new states lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory, or otherwise, with the consent of a number of voices in the national legislature less than the whole.

"XVIII. *Resolved*, That a republican form of government shall be guaranteed to each state; and that each state shall be protected against foreign and domestic violence.

July 23. "XIX. *Resolved,* That provision ought to be made for the amendment of the articles of union, whensoever it shall seem necessary.

"XX. *Resolved,* That the legislative, executive, and judiciary powers, within the several states, and of the national government, ought to be bound, by oath, to support the articles of union.

"XXI. *Resolved,* That the amendments which shall be offered to the Confederation by the Convention ought, at a proper time or times after the approbation of Congress, to be submitted to an assembly or assemblies of representatives, recommended by the several legislatures, to be expressly chosen by the people, to consider and decide thereon.

"XXII. *Resolved,* That the representation in the second branch of the legislature of the United States consist of two members from each state, who shall vote *per capita.*

26. "XXIII. *Resolved,* That it be an instruction to the committee, to whom were referred the proceedings of the Convention for the establishment of a national government, to receive a clause or clauses, requiring certain qualifications of property and citizenship, in the United States, for the executive, the judiciary, and the members of both branches of the legislature of the United States."

THE CONSTITUTION IN BLOCK.

FROM THE BEGINNING THROUGH THE LEGISLATIVE POWER.

Taking up the Virginia plan, the resolutions of the convention in committee of the whole and in convention, and beginning with the first of each, the Virginia plan would correct and enlarge the articles of the Confederation so as to accomplish the objects proposed by their institution, namely common defense, security of liberty, and general welfare, which objects were the objects of the Confederation and Union.[1] The convention in committee of the whole, postponing this first resolution of the Virginia plan at once resolved[2] that a national government ought to be established to consist of a supreme legislative, judiciary and executive. Again (after the Jersey plan had been rejected) the convention in committee of the whole resolved the same on June 19 ; then the convention sitting in convention adopted the same, but amended by substituting the words " government of the United States " for " national government," so that the resolution read " Resolved, that the government of the United States ought to consist of a supreme legislative, judiciary and executive." As amended, the reso lution was adopted by unanimous vote.[3]

But as will be observed, the Virginia plan provided further on in its resolutions that the government to be established should consist of a legislative, executive and judiciary which should be supreme, so that the Virginia plan, the convention in committee of the whole twice, and the convention sitting in conven-

1 See Article 3.

2 May 30, the vote being six states to one, one state divided.

3 See Journal, June 20.

tion were all agreed upon these propositions, (1) that the government should consist of a legislative, judiciary and executive, which (2) should be supreme. But on the third proposition there was a difference. The Virginia plan called the government to be established a national government, and so the convention in committee of the whole twice resolved, yet the convention in convention omitted the word " national," as stated, and used merely the designation " government of the United States "; and though the word " national " remained in the succeeding resolutions of the convention in convention, it disappeared from the drafts of the Constitution gradually, and was left out of the completed instrument. The reason of this will be submitted on the comparison of the Jersey plan. The word " national " had been used to designate the government of the United States in the Confederation and Union; thus as early as December 6, 1782, and again December 12, 1782, the Journal of Congress shows the government characterized as national by that body, and April 13, 1787, less than one month prior to the date set for the assembling of the convention, the Journal shows Congress beginning a Letter to the states to accompany the resolutions of Congress of March 21, 1787—of which more later—with the language " Our national constitution having committed to us the management of the national concerns," etc.; and the preamble to the resolution of Congress of February 21, 1787, calling the convention recites the desirability of a " firm national government. "

Of the two propositions upon which the Virginia plan, the convention in committee of the whole and again in convention were all agreed, namely that the government should consist of a legislative, judiciary and executive which should be supreme, the first was a departure from the Confederation and Union but the second was only a readoption of its law, though during the Confederation and Union the law could

not be enforced and was not observed. That by the constitutional law of the Confederation the several states were obligated to abide by the determinations of the United States in Congress, whereby the determinations of Congress were supreme over the several states appears from the following :[1]

It is submitted that the records show that the states came into being both jointly and severally at the same instant of time, yet that it was by the order and direction and the power of the states jointly, that is by the United States, that the several states were created and governments set up therein ; while the government for the Union was made by itself, by the states jointly, being then ratified by the states severally; wherefore the United States became supreme over the several states and the latter became bound by the former, though the latter retained qualified sovereignty for their separate purposes.

As provinces of Great Britain the colonies were members of a union in the old world, the United Kingdom of Great Britain, France and Ireland ; not questioning its supremacy over them or the beneficence of the British constitution but only denying government without representation whereby to rectify their grievances. Had representation been granted them they would have been put upon equal terms, it will be observed, with the constituent bodies of England having representation in Parliament, which were the counties and towns thereof, representation having come originally from the counties, and certain towns acquiring it later. Because denied representation, the colonies—without acting severally each for itself against Great Britain—sent deputies or representatives to a congress which assembled at Philadelphia, September, 1774, and became styled "the Congress of the United Colonies of North America."

[1] The following part on the origin and nature of the states and their governments is reprinted from a separate article, which may account for defects of order of arrangement and style of the whole. The same is true of what follows on direct taxes and on the limits of the Union.

Thus was formed, as matter of fact, a new union in the new world succeeding to the old union in the old world, the consideration to the several colonies for entering it being that they acquired here the representation in government denied to them over there, whereby their grievances were redressed and they were absolved from allegiance to the old world.

That this union was created by the authority of the people of all the colonies, witness the motto "Join or Die," which Mr. George Bancroft in his history of the United States says appeared in the Constitutional Courant in 1765, prior to the date set for the enforcement of the stamp act on November 1st of that year, and echoed over the continent ever afterwards.

From the first the Union ordered and directed the colonies in fact, as the Journal of Congress evidences; thus by Congress, styling themselves the representatives of the United Colonies of North America, all proceedings were instituted and conducted leading up to the Declaration of Independence, the protests, petitions, addresses, entreaties, expostulations, and threats, and preparation for armed resistance and war; and the war was prosecuted and independence achieved by the states jointly, and not severally.

So, it appears it was by the authority and direction of Congress that the several colonies set up new governments for themselves. June 9, '75, in response to a letter from the provincial convention in Massachusetts, Congress resolved that no obedience being due to the acts of Parliament for altering the charter of that colony, the offices of governor and lieutenant-governor were vacant, and recommended to the provincial convention to request the constituent places in the colony to choose representatives to the assembly, which assembly should elect councillors, and the assembly and council should exercise the powers of government according to the charter of the colony, until his majesty should consent to proceed according thereto. Thereafter, May 1, '76, the province of Mas-

sachusetts substituted " the government and people " for the style of royalty, as the authority for its legal procedure, and the province continued under the colonial charter till 1780, when it adopted a constitution, being the last of the original states so to do. November 3, '75, Congress recommended to the province of New Hampshire to call a full and free representation of the people, who should if they thought necessary establish such form of government as in their judgment should best conduce to the happiness of the people and to peace and good order in the province, during the continuance of the dispute between the colonies and Great Britain. Early in '76 New Hampshire adopted a constitution reciting that it was according to the recommendation of the Continental Congress. November 4, '75, Congress recommended to South Carolina the same as to New Hampshire, and South Carolina also, early in '76, adopted her constitution. December 4, '75, Congress recommended the same to Virginia, and Virginia adopted her constitution in 1776 ; but it went beyond the recommendation of Congress, being a permanent constitution ; and the Virginia Bill of Rights was also adopted, which was afterwards so much copied, the work ending June 29, three days before the resolution of independence in Congress, July 2. Yet in the meantime, May 10, '76, Congress resolved as follows: " That it be recommended to the respective assemblies and conventions of the United Colonies where no government sufficient for the exigencies of their affairs hath been hitherto established to adopt such governments as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular and America in general." May 15, '76, preamble to the last was adopted as follows: " Whereas his Brittanic majesty, in conjunction with the lords and commons of Great Britain, has by a late act of Parliament, excluded the inhabitants of these United Colonies from the protection of his crown ; and

whereas no answer whatever to the humble petition of the Colonies for redress of grievances and reconciliation with Great Britain has been or is likely to be given, but the whole force of that Kingdom, aided by foreign mercenaries, is to be exerted for the destruction of the good people of these Colonies ; and whereas it appears absolutely irreconcilable to reason and good conscience for the people of these colonies now to take the oaths and affirmations necessary for the support of any government under the crown of Great Britain, and it is necessary that the exercise of every kind of authority under the said crown should be totally suppressed, and all the powers of government exerted under the authority of the *people of the Colonies*, for the preservation of internal peace, virtue and good order, as well as for the defense of our lives, liberties and properties against the hostile invasions and cruel depredations of our enemies : Therefore resolved," etc., as above.

After this, all the other provinces adopted consti tutions during '76 or early in '77, ending with New York, April 20, '77—excepting only Rhode Island which having renounced allegiance to the king by act of assembly on May 4, '76, (being it seems the only colony to act prior to Congress' recommendation), continued on under her charter of 1663 until 1842, before adopting a state constitution. In six colonies the new constitutions refer by way of recital to the recommendation of Congress to set up new governments: New York, Georgia, New Jersey, New Hampshire, Pennsylvania, and Delaware. So with the well-known Mecklenburg Resolutions from Mecklenburg County, North Carolina, which recognized the authority of the Continental Congress, but not of the province of North Carolina.[1]

July 4, '76, the new Union assumed to be and became a body corporate and politic, known to the law,

[1] For the constitutions of the states with the dates of adoption, see Charters and Constitutions of the United States, compiled by Mr. Ben Perley Poore by authority of Congress.

taking its independent place among the nations of the earth, under the name and style of the United States of America, where it was soon recognized by France and the United Netherlands,— as later by other nations,—and entered into treaties with them; and on that day it declared the colonies to be states. The Declaration of Independence closes, "We, therefore, the representatives of the United States of America in general Congress assembled . . do, in the name and by the authority of the good people of these colonies, solemnly publish and declare that these United Colonies are, and of right ought to be free and independent states; that they are absolved from all allegiance to the British crown, . . and that as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and do all other acts and things which independent states may of right do. And for the support of this declaration . . we mutually pledge to each other our lives, our fortunes and our sacred honor."

The declaration is by the new power, the United States of America, by its representatives in general Congress assembled. It published and declared that the United Colonies, the colonies of the British empire which had been denied representation therein and entered into new Union here—not including Canada, Jamaica or any colony neglecting to unite, after all had been addressed—were free and independent states, absolved from allegiance to the British crown. Here the word "state" appears for the first time so far as observed, and would seem to have been used as in Europe at that time to denote the constituent bodies or component parts or members, which by representation, make up the whole body represented by the general legislature. Thus the word is defined to-day (see Webster's dictionary: state), and thus it was defined then in France and the United Netherlands where the states of the provinces constituted by

representation the states-general of the whole: then Parliament seems to have been called the states-general of the British empire;[1] and no other country supplied such precedents to America at that time as these three. So, too, the resolution of Congress of May 10, '76, above quoted, refers to the colonies as particular constituents of America in general. So it would seem the Union, the United States of America, by its representatives in general Congress assembled, declared the colonies to be constituent parts or members of itself, of the American Union, thus making them states, entitled in its states-general, the general Congress, to the representation denied them in the states-general of the British empire.

Jointly and severally, united as well as separately, they came into being, but united rather than separately, these states or constituent members of America were declared to have full power to levy war, conclude peace, contract alliances, establish commerce, and do all other acts which independent states may do ; separately, the states never sought to exercise these powers, and it would seem untrue to say the representatives pledged to each other their lives, fortunes, and honor in support of a declaration to be free and independent *of each other,* at the very moment of union for establishing independence of Great Britain. Such interpretation would abrogate the elemental motto of the period " Join or Die."

None of the states' constitutions, adopted at this period, prior to the Articles of Confederation and Perpetual Union, asserts the sovereignty of the state in any sense, except Connecticut, whose constitution preamble asserts the state's right to govern itself as a free, sovereign and independent state ; but no convention for framing a constitution was held in Connecticut, the constitution there being merely an act of assembly, which declared the old charter of 1662

[1] See quotation from the Wealth of Nations, Book V, chap. 3, Rogers's edition, vol. 2, p. 535-6, on p. 60 hereof.

to continue in force as the fundamental law of the state.

The first constitution in many states asserts the right of the state to govern itself only in internal affairs, and in the other states there is no assertion at all; thus in the constitutions or declaration of rights accompanying them, of the states of Maryland,[1] North Carolina,[2] Pennsylvania,[3] and South Carolina,[4] the right of the state is asserted to its "internal government and police." This accorded with the Declaration of Rights of October 14, '74 which asserted the right of the colonies—having no representation in Parliament—to free and exclusive legislation in "cases of taxes and internal polity," but subject, however, to the negative of their sovereign in the manner theretofore customary. And Blackstone says laws of police and revenue are not in force in the colonies.[5] So it was natural the several constitutions adopted upon the direction of Congress should extend no further than to "internal government and police."

The Union made its own government, the same being ratified by its several members, the states: The Articles of Confederation and Perpetual Union were made by the states jointly and ratified by them severally: On June 11, prior to the Declaration, Congress appointed a committee of one from each colony to prepare a draft of Articles of Confederation and Perpetual Union. The committee reported a draft on July 12. Thence for a period of sixteen months the terms and particulars of union were under consideration by Congress. On November 15, '77, Congress agreed to the articles, transmitting them to the states on November 17 for ratification. They run as follows in part: "Whereas, the delegates of the United States of America, in Congress assembled, did on the 15th day of November, in the year of our Lord 1777, and in

[1] Declar. of R., art. 2.
[2] Const., art. 2.
[3] Const., art. 3.
[4] Preamble.
[5] Black. Com., vol. I, Introd., sec. 4, p. 107.

the second year of the independence of America, agree to certain Articles of Confederation and Perpetual Union between the states of New Hampshire, Massachusetts Bay . . . and Georgia, in the words following, namely : Articles of Confederation and Perpetual Union between the States of New Hampshire, Massachusetts Bay, etc. . . Article I. The style of this Confederacy shall be ' The United States of America.' Article II. Each state retains its sovereignty, freedom and independence and every power, jurisdiction and right which is not by this Confederation expressly delegated to the United States in Congress assembled. Article III. The said states hereby severally enter into a firm league of friendship with each other for their common defense, the security of their liberties, and their mutual and general welfare ; binding themselves to assist each other against all force offered to them, etc. . . . . Article XIII. *Every state shall abide by the determination of the United States in Congress assembled on all questions which by this Confederation are submitted to them.* And the articles of this Confederation shall be inviolably observed by every state, and the Union shall be perpetual ; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every state." The ratification runs " Know ye, we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and Perpetual Union, and all and singular the matter and things therein contained. And we do further solemnly plight and engage the faith of our respective constituents that they shall *abide by the determinations of the United States in Congress assembled, on all questions which by the*

said Confederation are submitted to them ; and that the articles thereof shall be inviolately observed by the states we respectively represent ; and that the Union shall be perpetual."

Here the existence of the Union as a body politic is assumed and its delegates assembled in Congress agree to certain articles (latin, articulus, diminutive of artus, joint ; little joints) that is particulars, terms of confederation and perpetual union. The articles are between (not by, or by and between as in articles of agreement usually, but only between) the several states or constituent bodies composing the Union. The name or style is formally given, the United States of America, as in the Declaration. In Article two the delegates of the United States of America agreed and determined that each state should retain its sovereignty, freedom and independence, and every power, jurisdiction and right not by the Confederation, that is by the United States of America, delegated to the United States in Congress; that is the United States of America delegates to the legislative body, " The United States in Congress " a certain portion of sovereignty, freedom and independence, and some power, jurisdiction and right, and agrees that the residue be retained by the states severally. In Article three, the delegates of the Union agree and determine the character of the Union, that the states enter severally into a firm league of friendship binding themselves to assist one another against attacks, etc. In Article thirteen the delegates of the Union agree and determine that every state shall abide *by the determination of Congress on all questions submitted to them by the Confederation,* and the articles shall be observed and the union be perpetual ; no alteration to be made but by agreement of Congress, that is, the states jointly, confirmed by the states severally by their legislatures. The articles having been agreed and determined upon by the states jointly, are ratified by the states sever-

ally, the states' legislatures authorizing the delegates who on the part and on behalf of their respective constituents ratify the same, and solemnly plight and engage the faith of their constituents to *abide by the determinations of Congress,* etc.

That the articles were made and ratified by the states both jointly and severally seems to have been matter of common observance at the time. Thus in the Crisis, Number Eleven, in his Address to the People of America, in 1782, Thomas Paine says " In the meantime the Union has been strengthened by a legal compact of the states jointly and severally ratified, and that which before was choice is now likewise the duty of legal obligation. The Union of America is the foundation stone of her independence, the rock on which it is built ; and is something so sacred in her Constitution that we ought to watch every word we speak, and every thought we think that we injure it not, even by mistake."

The obligations of the several states' governments to abide by the determination of the United States in Congress assembled on all questions submitted to them by the Confederation and Union constituted Congress supreme over the several states. Yet the question whether the states jointly or the states severally were supreme in matters of controversy was ever the subject of difference of interpretation and construction, as will be observed.

The other proposition that the government should consist of a legislative, judiciary and executive was a departure from the Confederation and Union, where the government consisted of the legislative, the United States in Congress: what executive or judiciary powers there were were vested in or dependent upon Congress ; the president was president of Con-

gress, not of the United States of America ; the judiciary whose jurisdiction was confined to cases of captures at sea, piracies and felonies, etc., were appealed from to Congress. A government consisting of legislative, judiciary and executive was in accordance with the constitutions of the several states and the constitution of Great Britain, the constitutions of the several states being modeled after the constitution of Great Britain, having been drawn directly from the charters of the several colonies during the Revolution, which latter were formed, *mutatis mutandis,* upon the constitution of the mother country.

The charters of the several colonies show the legislative and executive separate and distinct from each other, from the first settlement of Virginia down to the Revolution, as they were in England during the same period, but the judiciary, whose powers had been exercised by the legislative and executive with resultant oppression of the people, had only recently become separate and distinct from them, and the separate and distinct nature of the three powers was the subject of particular solicitude and expression at this period. Thus it is declared in the constitutions of several states framed during the Revolution that the legislative, executive and judiciary should be separate and distinct.[1]

As means of securing the independency of the judiciary from the oppression of the legislative and executive, the term of office of the judiciary was made "during good behavior," so that they were no longer subject to removal by the legislative as theretofore; and their compensation was made no longer subject to diminution during their term of office.[2] As to England, Blackstone speaks of the British government

[1] Constitution Georgia, Art. 1; Declaration of Rights accompanying Constitution of Maryland, Art. 6 ; Constitution Massachusetts, Art. 30; Bill of Rights accompanying Constitution of New Hampshire, Art. 37; Declaration of Rights accompanying the Constitution of North Carolina, Art. 4; Virginia Bill of Rights, Section 5.

[2] Constitution Maryland, Art. 30; Constitution Massachusetts, Art. 29: Bill of Rights accompanying Constitution of New Hampshire, Art. 35.

consisting of legislative and executive,[1] but later in the Commentaries he declares the judiciary to be *separate and distinct* from the legislative and executive by virtue of certain acts recently passed for that purpose, securing the judiciary against removal from office by the legislative, by making their term during good behavior, and securing their compensation against diminution during their term.[2] Blackstone and Montesquieu were the chief authorities of this period upon the British constitution it has always been admitted, and that they were the chief authorities consulted by members of the convention;[3] and Montesquieu says the constitution of England consists of three sorts of powers, legislative, executive and judiciary.[4]

At the same time that the legislative, executive and judiciary were declared separate and distinct, and the independency of the judiciary secured, the oppression of the legislative and executive was sought to be restrained. Several state constitutions of the period declare that the members of the legislative and executive should be restrained from oppression by feeling and participating in the burdens of the people, and therefore the people have the right to return them to private station at fixed periods and fill the vacancies by election.[5]

Recurring to the comparison, the resolution of the Virginia plan that the national legislature ought to consist of two branches[6] was reported from the committee of the whole twice[7] and adopted by the conven-

1 Black. Com., Book I, Chapter 2.

2 Black. Com., Book I, chap. 7, p. 269.

3 See the Federalist, No. 47, by Madison. Montesquieu is said to have derived his reading of the British Constitution from Locke's treatise on Civil Government.

4 Montesquieu, Spirit of Laws, Book XI.

5 Constitution Massachusetts, Art. 8; Constitution Pennsylvania, Art. 6; Virginia Bill of Rights, Section 5; Constitution Vermont, Art. 7.

6 Resolution 3.

7 Resolution 2.

tion in convention.[1] It was a departure from the Confederation and Union, wherein the legislative had but one chamber, and proceeded in accordance with the constitutions of the several states and the constitution of Great Britain. All the several states but Pennsylvania and Georgia had legislatures of two chambers; and Blackstone and Montesquieu speak of the parliament of Great Britain as consisting of " two branches."[2]

The resolution of the Virginia plan that the members of the first branch of the legislature ought to be elected by the people of the several states,—and providing for the duration of the term of office of members, their age, compensation, ineligibility to other office, etc.,[3] was reported from the committee of the whole twice[4] and was adopted by the convention in convention.[5] It was a departure from the Confederation and Union wherein the members of the single chamber were chosen by the several state legislatures, and proceeded in accordance with the constitutions of the several states and of Great Britain in respect of the corresponding branch of their legislatures. Blackstone says the members of that branch of the legislature are " chosen by the people " of the several counties and towns, which are the constituent bodies of England;[6] and that house was likewise the popular branch of the legislatures of the several colonies, and thence the several states, elected by the people of the constituent bodies thereof, the several counties or towns.[7]

As to the election of members of the second branch, the committee of the whole house resolved twice[8] and

1 Resolution 2.
2 Black. Com. Intro., Sec. 2; Montesquieu, Spirit of Laws, Book XI.
3 Resolution 4.
4 Resolution 3.
5 Resolution 3.
6 From 7 Henry IV, Chapter 15; 23 Henry VI, Chapter 15.
7 Black. Com. Introduction, Sec. 2, and the several state constitutions, and Montesquieu Spirit of Laws, Book XI.
8 Resolution 4.

the resolution was adopted by the convention in convention[1] that the members of the second branch ought to be chosen by the individual legislatures,—provision being made for the duration of the term of office of members, their age, compensation, ineligibility to other office, etc. This was a departure from the Virginia plan, which proposed[2] that the second branch be nominated by the individual legislatures, but elected by the first branch ; but it was according to the Confederation and Union, whereby the state legislatures chose the delegates to Congress.

The Virginia plan proposed,[3] and the convention twice resolved in committee of the whole,[4] and then in convention,[5] that both branches of the legislature should have the power to originate acts of legislation which was, again, according to the British constitution,—when qualified as respects money bills,—and the constitutions of the several states.[6]

Concerning the powers of the legislative, the Virginia plan proposed,[7] and the convention in committee of the whole house resolved twice,[8] and again in convention adopted the resolution,[9] that the national legislature should have the legislative rights vested in Congress by the Confederation ; and moreover to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation. The convention in convention also added the clause "for the general interests of the Union," so that the whole read: "*Resolved,* That the national legislature ought to possess the legislative rights vested in Congress by the Confederation ; and moreover to legislate in all cases for the general interests of the Union, and also in those to which the

1 Resolution 4.
2 Resolution 5.
3 Resolution 6.
4 Resolution 5.
5 Resolution 5.
6 Black. Com., Bk. 1, ch. 2, and Introd., Sec. 2.
7 Resolution 6. 8 Resolution 6. 9 Resolution 6.

states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." This was an adherence to the Articles of Confederation and Union, and furthermore proceeded in accordance with the constitutions of the several states and the British constitution.

The grant of power to the national legislature such as was vested in Congress by the Confederation was an adherence to the Confederation and Union, and the grant of legislative power in all cases to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation, was according to the constitutions of the several states and of Great Britain, in that it reserved to the several states, the constituent bodies or component members of the Union, the identical legislative powers reserved to the constituent bodies of the several states and of England, the several counties and towns thereof, by that principle of their constitutions which is usually called the principle of local self-government, which is the ground of American and English constitutional law.

The principle is thus stated by a leading authority of this country : " The primary and vital idea of the American system is that local affairs shall be managed by local authorities and only general affairs by the central authority. It was under control of this idea that a national constitution was formed. . . . This system seems a part of the race to which we belong. A similar subdivision of the realm for the purposes of municipal government has existed in England from earliest ages."[1] " Local self-government having always been a part of the English and American systems, we shall look for its recognition in any such instrument " as a constitution.[2]

[1] Cooley's Constitutional Limitations, *p. 189: 5th edition, p. 225.
[2] Id., *p. 35.

Reserving to the several states, the constituent bodies of the Union, the same legislative powers the several states and England reserved to their constituent bodies, the convention granted to the national legislature the same powers granted by the constitutions of the several states and of England to their legislatures, that is power to legislate in all cases to which the constituent bodies are separately incompetent, or their individual legislation would interrupt the harmony of the whole ; thus the convention granted to the national legislature the legislative powers of a harmonious or perfect Union. To this the convention in convention further added the clause " for the general interests of the Union." This was a grant of power according to the *purposes* of Congress by the Confederation—whether or not Congress had power by the Confederation adequate to their purposes. Thus article 5 of the Confederation and Union begins, " For the more convenient management of the general interests of the United States, delegates shall be annually appointed, etc." And article 9, paragraph 5, authorizes Congress to appoint committees and civil officers to manage the general affairs of the United States under their direction. Therefore, taking the legislative power entire, the convention proceeded according to the Articles of Confederation and Union, and also the constitutions of the several states and of England, resolving that the national legislature should have the legislative rights vested in Congress by the Confederation, and moreover in all cases according to the purposes of Congress by the Confederation, and where the states are separately incompetent, or their individual legislation might interrupt the harmony of the Union ; that is to say, the same legislative powers over the several states, the constituent bodies or component members of the Union, which the several states and England have over their constituent

bodies, the several counties and towns thereof, which legislative power is that of perfect union.

Here may be noted a resolution which it was moved and seconded to postpone the above resolution in order to consider, but which was passed in the negative and rejected. It was to empower the legislature "to make laws binding on the people of the United States in all cases which may concern the common interests of the Union; but not to interfere with the government of the individual states, in any matters of internal police, which respect the government of such states only, and wherein the general welfare of the United States is not concerned."[1]

This resolution while granting to the national legislature power as in the resolution adopted, yet would have reserved to the several states the identical powers they asserted their right to as colonies against Great Britain; and moreover the power granted to Congress was couched in the language used by Parliament which occasioned the assertion. By 6 George III, Chapter 12, (1766,) Parliament declared their right "to bind the colonies and people of America subject to the crown of Great Britain in all cases whatsoever." This act has always been recited as one of the chief causes of the Revolution. By the Declaration of Rights of the Continental Congress of October 14, 1774, it is recited, and denied, and the right of the several colonies asserted to govern themselves in "cases of taxes and internal police" on the ground of no representation in Parliament. When the state constitutions were adopted in 1776-77, several of them asserted the right to govern themselves in their internal police, as already observed, notwithstanding they had representation in Congress. June 28, '78, it is entered in the Journal of Congress, "Resolved that Congress cannot in any manner control the legislature of New Jersey in the internal police of said

[1] July 17, in convention.

state." Now it was moved and seconded to grant to the national legislature the power of Parliament according to the principle of general (self) and local self-government, but reserving to the states the rights of internal police asserted against Parliament; but they having the representation in the United States denied to them in Great Britain, the motion passed in the negative and was rejected, as observed.

Next the Virginia plan proposed (1) that the national legislature ought to be empowered to negative all laws passed by the several states, contravening, in the opinion of the national legislature, the articles of Union, or any treaty subsisting under the authority of the Union; and (2) to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof. The convention in committee of the whole adopted the first clause of this proposal—that the national legislature ought to be empowered to negative all laws passed by the several states, contravening, in the opinion of the national legislature, the articles of union, or any treaty subsisting under the authority of the Union,—but postponed the second clause providing for calling forth the force of the Union against members thereof, and the second clause was never taken up again. Again, June 19, the convention in committee of the whole reported the first clause. The convention sitting in convention rejected the first clause, but on the same day, and immediately thereafter, adopted the following instead, the vote on the adoption being unanimous:[1] "VII. *Resolved,* That the legislative acts of the United States, made by virtue and in pursuance of the articles of union and all treaties made and ratified under the authority of the United States,

[1] See Journal, July 17.

shall be the supreme law of the respective states, as far as those acts or treaties shall relate to the said states or their citizens and inhabitants; and that the judiciaries of the several states shall be bound thereby in their decisions, anything in the respective laws of the individual states to the contrary notwithstanding."

The clause proposed by the Virginia plan and reported from the committee of the whole to the convention was drawn from the British constitution. This appears from the Declaration of Rights of October 14, 1774, where the right of the several colonies, having no representation in Parliament, is asserted to govern themselves in matters of taxation and internal police, "subject to the negative of their sovereign as heretofore used and accustomed;" and Mr. Madison, who was a leading member of the Virginia delegation in the convention in drawing the Virginia plan,[1] says in his introduction to his private journal of the convention that "the feature . . . which vested in the general authority a negative on the laws of the states was suggested by the negative in the head of the British empire, which prevented collisions between the parts and the whole, and between the parts themselves."[2]

But the clause which was adopted instead of this by the convention in convention was drawn from the Articles of Confederation and Perpetual Union as interpreted and construed by the United States in Congress. This construction occurred as follows :

The Confederation and Union by Articles 9 and 13, as well as by the terms of the ratification, conferred on Congress sole and exclusive power of entering into treaties and alliances—with some exception as to treaties of commerce—and the states were obligated to abide by the determinations of Congress thereupon; but after the treaty of peace with Great Britain was

[1] General Washington is said to have copied Montesquieu's British constitution for use in drawing up the Virginia plan: Bancroft's History.

[2] Elliot's Debates, vol. 5, Introduction to the Debates in the Convention.

made and entered into by Congress in 1783 the several states did not abide by it as determined by Congress, but their legislatures passed acts for the purpose of interpreting, construing, and explaining the treaty to suit their several purposes, and also to oppose its execution according to its true intent and meaning as interpreted and construed by the United States in Congress. Great Britain made complaint of the non-fulfillment of the treaty according to its terms, and in consequence delayed the evacuation of frontier forts ceded to the United States. As a result of this, a leading issue of the period, Congress, on March 21, 1787, resolved as follows, by vote unanimous:

"*Resolved*, That the legislatures of the several states cannot of right pass any act or acts for interpreting, explaining, or construing a national treaty, or any part or clause of it; nor for restraining, limiting, or in any manner impeding, retarding or counteracting the operation and execution of the same, for that on being constitutionally made and ratified, and published, they become in virtue of the Confederation part of the law of the land, and are not only independent of the will and power of such legislatures, but also binding and obligatory on them.

"*Resolved*, That all such acts or parts of acts as may be now existing in any of the states, repugnant to the treaty of peace, ought to be forthwith repealed, as well to prevent their continuing to be regarded as violations of that treaty as to avoid the disagreeable necessity there might otherwise be of raising and discussing questions touching their validity and obligation.

"*Resolved*, That it be recommended to the several states to make such repeal rather by describing than reciting the said acts, and for that purpose to pass an act declaring in general terms that all such acts or parts of acts as are repugnant to the treaty of peace between the United States and his British majesty, or any article thereof, shall be and thereby are repealed, and that the courts of law and equity in all causes and questions cognizable by them respectively and arising from and touching the said treaty shall decide and adjudge according to the true intent and meaning of the same, any thing in the said acts or parts of acts to the contrary thereof in any wise notwithstanding."

To accompany this resolution, Congress issued the following Letter to the several states bearing date April 13, 1787:

"Our national constitutional having committed to us the management of the national concerns with foreign states and powers, it is our duty to take care that all the rights they ought to enjoy remain inviolate. And it is also our duty to provide that the essential interests and peace of the whole confederacy be not impaired or endangered by deviations from the line of public faith into which any of its members may from whatever cause be inadvisedly drawn. Let it be remembered that the thirteen independent states have,[1] by express delegation of power formed and vested in us *a general, though limited sovereignty for the general and national purposes specified in the confederation* . . . Such laws—as recommended by the resolution of March 21 aforesaid—would answer every purpose and be easily formed. The more they were of like tenor throughout the states the better. They might each recite that whereas certain laws or statutes made and passed in some of the United States are regarded and complained of as repugnant to the treaty of peace with Great Britain, etc., Be it enacted by . . . and it is hereby enacted by the authority of the same, that such of the acts or parts of the acts of the legislature of the state as are repugnant to the treaty of peace between the United States and his British majesty or any article thereof, shall be and they hereby are repealed. And further that the courts of law and equity within this state be and they hereby are directed and required in all causes and questions cognizable by them respectively, and arising from and touching the said treaty to decide and adjudge according to the tenor, true intent and meaning of the same, any thing in the said acts or parts of acts to the contrary thereof in any wise notwithstanding."

Here Congress resolved unanimously, and issued a Letter to the several states accompanying the resolution only one month prior to the date already set for the assembling of the convention, that by virtue of the Confederation national treaties constitutionally made and ratified were part of the law of the land, binding and obligatory on the states; and courts of law and equity were to be directed and required to decide and adjudge accordingly, any thing in state

[1] Jointly and severally.

laws to the contrary in any wise notwithstanding. This was a construction of the Articles of Confederation and Perpetual Union, that, as the acts of Congress, so the treaties of Congress made pursuant to the constitution, became the law of the land, binding and obligatory on the states.[1] From this resolution of Congress, it may be submitted, the resolution of the convention in convention was drawn.

Comparing the clause negativing the laws of the several states adopted by the convention in committee of the whole, from the Virginia plan, from the British constitution, with the clause adopted instead by the convention in convention from the resolution of Congress declaring the laws and treaties of the United States to be supreme, the following may be observed: First, that the latter clause was like the former in that it was a *negative on the state laws* repugnant to the constitutional acts and treaties of the Union, because laws repugnant to each other cannot co-exist, but one or the other must give way, and the laws of the United States being supreme and binding on the several states, the acts of the several states contrary or repugnant thereto must be void. Second, that the former clause was like the latter in that the negative on state laws would be not by the enacting or creating of new law, but by the declaration of the meaning of old law, the interpretation or construction of the constitutional law, because laws contrary to the constitution *must be void,* wherefore the only office of the negative is to interpret and declare the constitution to pronounce them void. But—third—the two clauses differ in that the former was expressed to be a negative on the state laws while the latter was not; the former was an express, direct negative, the latter was an implied, indirect negative, a negative by necessary consequence. That the object of both clauses was the

[1] It was afterwards held by the Supreme Court of the United States that the treaty of peace with Great Britain worked a repeal of the laws of the several states repugnant thereto ; the occasion being the impediments which the laws of Virginia put to the collection of British debts in sterling money by virtue of the treaty. Ware Admr. v. Hylton, 3 Dallas, U. S., 199.

same, to negative state laws contrary to the constitutional acts and treaties of Union, the difference being that the former was express and direct, the latter indirect and consequential appears in the proceedings of the convention, showing the further purpose of the clauses.

The clause of the Virginia plan which came immediately after the express negative on the state laws and was by the convention in the committee of the whole postponed, resolved that the national legislature should be empowered to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof.[1] During the Confederation such power as this could never be exercised, although the necessity for it appears to have been felt very early, and Mr. Madison, at least, seems to have claimed that the Confederation and Union possessed the "implied right of coercion" of its members by virtue of its inherent nature.[2] General Washington in his letter to the governors and presidents of the several states on relinquishing command of the army in June, 1783—his "Legacy" so-called—urged that the Confederation should have such power,[3] and Mr. Madison urged the same, as did also Mr. Jefferson.[4] Moreover the Jersey plan offered the same, as will be observed, offering authority to call forth the powers of the confederated states or so much thereof as may be necessary to enforce and compel obedience to the acts and treaties of the United States pursuant to the confederation, against any state or body of men in any state opposing or preventing the carrying into execution of such acts or treaties.[5] So the convention following as it did, one or the other plan, the Virginia plan or the Jersey plan, as will be observed, would very probably have adopted this clause, but that the

1 Resolution 6.
2 Bancroft's History of the United States, vol. 5, p. 455-457.
3 Bancroft, vol. 6, pp. 83-6. Fiske's Critical Period of American History, p. 54.
4 Bancroft, vol. 5, pp. 455-57. Fiske's Critical Period, pp. 99-100.
5 Resolution 7, par 2.

negative on state laws just adopted was a means to the same end but *milder and easier*. To negative state laws contravening the acts and treaties of Union would reach back of any physical acts violative of the duty of the states to the Union, or opposing or preventing the execution of the laws of the Union and eradicate and destroy the authority for such acts; thus obviating the necessity for a resort to coercion of arms against a state or any one acting by authority of a state, because the subject of coercion would have no state authority to rely upon, while the exercise of coercion would be but the execution of the laws of the United States. Thus was the coercion of law substituted for the coercion of arms. That the postponement of force of arms was because the negative on state laws was a milder means to the same end is stated by Mr. Madison who moved the postponement in committee of the whole before the clause came to a vote.[1] But an indirect or consequential negative was a still milder means to the same end, than was an express negative. As, rather than coerce a state by force of arms or any one acting by its authority, it would be milder to negative the state law and so eradicate the authority, so, rather than express the negative on the state law, it were still milder, less offensive to state pride, to declare the supremacy of the United States law, whereby the mere interpretation of the latter contradicting the former would operate silently and by necessary consequence, rather than directly to over-rule and negative the former. That this was the reason of the substitution of the implied negative for the express negative appears from the debates of July 17 when the former was finally adopted.[2]

Another matter of observance with respect of these two clauses is that as the express negative on the states was to be by the national legislature whenever

[1] Mr. Madison's journal of Debates in Convention, vol. 5 Elliot's Debates, May 31. And see Mr. Wilson's contrast of the Virginia and Jersey plans, on June 16; reported in Yates' Minutes.

[2] It was feared the express negative would disgust the several states.

in their opinion state laws should contravene the acts and treaties of the Union, so in the resolution of Congress aforesaid the implied negative was to be by the national legislature on the ground that state laws were contrary to the constitutional acts and treaties of the Union *in their opinion*. In other words, in the Virginia plan and the resolution from the committee of the whole, by the express negative, and in the resolution of Congress wherefrom the resolution of the convention in convention was drawn, by the implied negative, the interpretation and construction of the constitution belonged to the legislative, rather than to the executive or judiciary. Accordingly, Congress resolving that their acts and treaties made pursuant to the constitution were supreme, recommended to the several state legislatures formally to repeal their acts repugnant thereto, and furthermore to direct and require courts of laws and equity of the several states to decide and adjudge according to the true intent and meaning of such acts and treaties of Congress, that is, according to the interpretation of Congress.[1]

In the Confederation and Union it belonged to Congress to interpret and construe the Articles, the first constitution of America; by the constitution of Great Britain the same belonged to Parliament, although the express negative on the several colonies in America was exercised by the British executive;[2] by the

[1] By the resolution of Congress wherefrom the resolution of the convention in convention was drawn, and by the resolution of the Virginia plan and of the committee of the whole, the matter would read: "*Resolved*, that the legislative acts of the United States made by virtue and in pursuance of the articles of union, *in the opinion of the national legislature*, and all treaties made and ratified under the authority of the United States, *in the opinion of the national legislature*, shall be the supreme law of the respective states, as far as those acts or treaties shall relate to the respective states, or their citizens or inhabitants; and that the judiciaries of the several states shall be bound thereby in their decisions, anything in the respective laws of the individual states to the contrary notwithstanding."

[2] But the laws of Parliament having been supreme over the several colonies, Parliament, by the enactment and interpretation of legislation contrary to the acts of the several colonies, had exercised over them the indirect or implied negative as certainly and effectually as the British executive had exercised over them the express negative, and in the same way the legislatures of the several states had indirectly negatived the county and town governments within their respective states.

constitutions of the several states the same belonged at that time to their legislatures; and it is noteworthy that this is the only point wherein all the precedents, American and English, were agreed, namely, that interpretation belonged finally to the legislative, rather than to the executive or judiciary. In sum, it may be said of these clauses from the British and American constitutions, that both were interpretations of the constitution for the purpose of putting the negative on the laws of the several states repugnant to the acts and treaties of the Union, but the former was express and direct, the latter indirect and consequential; but both were to avoid coercion of the states or their authority by force of arms; and both were, by the precedents, exercised by the legislative.

RULES OF REPRESENTATION AND DIRECT TAXATION, AND THE MEANING OF DIRECT TAXATION.

Concerning the rule or measure of representation from, or suffrage or membership of the several states in the national legislature, the Virginia plan proposed a rule in the alternative, either one of two, as one or the other should seem best; that it should be according to their quotas of contribution, or to their numbers of free inhabitants; and this rule was to obtain in both branches of the legislature.[1] The committee of the whole accepted the first alternative, and resolved that the suffrage of the states in the first branch of the legislature should be not as in the Confederation—where the several states voted equally—but according to the whole number of their free inhabitants and three-fifths of all others, which rule was the rule of their quotas of contribution as will be observed; and that representation in the second branch should be as in the first.[2]

The convention in convention adopted the rule from the committee of the whole as to the first branch, that representation should be according to the whole number of free inhabitants and three-fifths of all others, and they applied this rule for the first formation of the legislature, ascertaining and declaring how many members each state should have in the first formation, and for the future provided that representation should be apportioned from time to time according to population; then they provided that representation ought to be proportioned according to direct taxation, and that in order to ascertain the latter from time to

[1] Resolution 2.

[2] Resolutions 7 and 8, the rules for the two branches being separated.

time, a census should be taken every ten years of all the inhabitants of the United States, in accordance with the ratio recommended by the resolution of Congress of April 18, 1783, and direct taxation should be proportioned accordingly. *But* all bills for raising money should originate in the first branch of the legislature, and not be altered or amended by the second. *And* in the second branch of the legislature the several states should have equal votes.[1]

The Virginia plan in its first alternative, that the several states should be represented in the national legislature according to their quotas of contribution, was according to that principle of the British constitution which the colonies had contended for and made the cause of the Revolution, the principle that the members of the empire should be represented in pro portion as they were taxed. Speaking of the extending of British taxation to the colonies, a British authority, Adam Smith, thus stated the principle in 1776:

" By extending the British system of taxation to all the different provinces of the empire inhabited by people of either British or European extraction, a much greater augmentation of revenue might be expected. This however, could scarce perhaps be done consistently with the principles of the British constitution, without admitting into the British Parliament, or if you will, into the states-general of the British empire, a fair and equal representation of all those different provinces, that of each province bearing the same proportion to the produce of its taxes as the representatives of Great Britain might bear to the produce of the taxes levied upon Great Britain."[2]

And Blackstone says, " a tax granted by the Parliament of England shall not bind those of Ireland because they are not summoned to our Parliament."[3]

[1] Resolutions 8, 9, 10, and 11.

[2] Wealth of Nations, published in 1776: Book V, chap. 3: Rogers's edition, vol. 2, p. 535-6.

[3] Black. Com., Introd., sec. 4, vol. 1, p. 101.

But though the Virginia plan proposed the British constitutional principle of representation of the members of the Union, that it should be according to their quotas of contribution, yet the *rule* which it proposed was the American rule, the rule of the Confederation and Union as amended. In the Confederation and Union the rule of quotas of contribution from the states had been the value of their lands with improvements thereon, but by resolution of Congress of April 18, 1783, recommended to the states for ratification, the Confederation and Union had been amended so that the states should contribute according to the whole number of their free inhabitants and three-fifths of their slaves, and this amendment had been ratified by at least eight states, and was accepted without dissent in the convention as the rule of quotas of contribution, as is elsewhere more fully set out. On this change of rule the only question was,—and that question was the subject of much consideration, the North and South dividing upon it,—whether the rule should be the whole number of free inhabitants, or the whole number of free inhabitants together with three-fifths of the slaves,—that is whether, and to what degree slaves should be included in the numbers; so when the Virginia plan proposed that the states should have suffrage in proportion either to their quotas of contribution, or in the alternative, their number of free inhabitants, the only rule of quotas known as an alternative to the number of free inhabitants being the number of free inhabitants and three fifths of the slaves, it was equivalent to proposing on the one hand the principle of the Revolution, of representation according to taxation, together with the rule which had been settled between the north and south after much controversy, the rule of numbers including three-fifths of the slaves, or, in the alternative, the exclusion of the slaves from the rule of representation, which would violate the principle of representation according to taxation, unless the compromise of

1783 as to the slaves was set aside and that subject reopened to consideration.

The convention in committee of the whole accepted the first alternative as stated and resolved that representation should be according to the whole number of free inhabitants and three-fifths of all others, which was the rule of contributions in the first branch; and in the second branch the same; thus impliedly adopting the British constitutional principle and expressly adopting the American rule, and these for both branches.

The convention in convention adopted the rule and principle expressly for the first branch, applying the rule for representation in the first formation of the legislature, and providing for regulation of representation in future according to population, and stating the principle that representation should be according to direct taxation,—for direct taxation is the name always given in Great Britain, the several states, and elsewhere, to taxation of the constituent bodies individually in contrast to their taxation collectively, the former taxing each directly, the latter only indirectly —as is elsewhere observed: then they provided for decennial censuses to ascertain the population according to the ratio of the Confederation amendment aforesaid, whereby direct taxes as well as representation should be apportioned: For the second branch they abandoned both rule and principle and followed the Confederation, resolving that therein each state should vote equally; but in consideration thereof it was further resolved that the first branch should originate all bills for money which should not be altered or amended by the second branch, which again was according to the British constitution, where the house of lords cannot amend bills for revenue.[1]

This was,—with what it involved,—the leading compromise of the convention, as has been always recog-

[1] Black. Com., book I, chap. 2, p. 169, Crabbe's History of English Law, p. 521.

nized. It is indicated in the several resolutions, in that in the Virginia plan the rule of representation for both branches of the legislature is put immediately after the first resolution to revise the Confederation, but in the resolutions of the committee of the whole and also in convention the rules of representation for both branches come at the end of the resolutions upon the legislative, since then only could the rules of representation be agreed upon.[1]

The steps of this compromise, taken from the Journal, are as follows: July 2, a committee of one member from each state was appointed upon the 8th resolution from the committee of the whole, and so much of the 7th resolution as was not already agreed to, being so much of the 7th resolution as provided the rule of representation in the first branch. July 5, the committee made report in two paragraphs, the first paragraph containing two clauses, the first clause being that in the first branch each state should have one member for every 40,000 inhabitants of the description reported in the 7th resolution from committee of the whole (*i. e.* free inhabitants and three-fifths of others), but each state to have at least one member; and the second clause being that all bills for revenue should originate in the first branch, and not be altered or amended by the second,—no money to be drawn from the public treasury but pursuant to appropriations originating in the first branch; the second paragraph being that in the second branch each state should have equal vote. This was the compromise made in committee, and it would seem to have been at once accepted, for, though, July 6, the first clause was referred to a committee of five, this reference appears to have been merely in order to ascertain definitely how many members should make up the legislative first branch in its first formation, *because*

[1] In convention the legislative powers and the rules of representation were settled July 16th and July 17th; the latter just before the former.

the second clause was adopted on the same day, and July 7 the second paragraph was adopted, and July 9 the committee of five on the first clause made report of two paragraphs, the first paragraph providing that the first branch should have fifty-six members at first, and the second paragraph providing for regulating future membership on the principles of wealth and number of inhabitants, *and* the second paragraph was at once adopted, the first paragraph being again referred to another committee of one member from each state, which latter reference would seem again merely to reascertain the membership of the first branch at first, because July 10 the latter committee reported sixty-five members for the first branch at first (instead of fifty-six members) and how many each state should have, and this report was at once adopted. Then July 11 the paragraph on regulating future representation according to wealth and number of inhabitants was amended to provide a census to ascertain the same. July 12 it was resolved (and it is worthy of note that the resolve was unanimous) that direct taxation ought to be proportioned according to representation ; then that there should be censuses whereon to base direct taxation, which censuses should be according to the ratio of the resolution of April 18, 1783, aforesaid. July 13 the principles of wealth and number of inhabitants whereon to apportion representation were altered to number of inhabitants alone, by striking out " wealth."

Thus was expressly stated the principle from the British constitution, which had occasioned the Revolution, and had been assumed in the resolutions from the committee of the whole, and was adopted with the rule of the Confederation amended; moreover reference to slaves as " wealth " was eliminated, they being included in the number of inhabitants ; and the census was established to include slaves, yet not expressed as the basis of representation but as the basis of direct

taxation, representation then being proportioned according to direct taxation. July 16, the whole of the report from the committee appointed July 2nd, as amended, was adopted.

Here where the phrase "direct taxes" first appears in the Journal, coupled with representation, each being proportioned according to the other, and both according to the ratio of the resolution of Congress of April 18, '83—and in the compromise whereby the means were retained to the several states to construe the government according to the Jersey plan—it seems proper to set out the further evidence upon the meaning of direct taxes.[1]

During the time of the colonies the revenues levied by Great Britain were of two kinds ; those partitioned or apportioned out into quotas and laid one upon each colony, and those laid all one and undivided or unapportioned throughout all the colonies. In the matter of raising revenues, as also troops, the colonies were considered separately or united, severally or jointly, as many or as one.

The "stamp-tax," so called, of 1765, by 5 George III, Ch. xii, was a duty laid all one and undivided throughout the colonies, and provided that from and after November first of that year there should be raised, levied, collected and paid throughout the colonies and plantations in America for "every skin or piece of vellum or parchment or sheet or piece of paper on which should be engrossed, written or printed any declaration, plea, replication, rejoinder, demurrer or other pleading, or any copy thereof, in any court of law within the British colonies and plantations in America, a *stamp duty* of three pence." Further paragraphs imposed further stamp duties on pieces of vellum, parchment or paper used for other

[1] From Direct Taxes in the Constitution, by the writer.

purposes in courts of law. The words vellum, parchment or paper, are to be observed because they appeared again in the Jersey plan of government in the convention of 1787 as the subject matter of the duty on stamps there offered to be conferred on Congress, and came down into the war revenue law enacted by Congress in the year 1898, which provides for revenue by stamps upon vellum, parchment or paper. Besides the duties on stamps the main subjects of duties laid one and undivided throughout the colonies were imports and postage, the acts of Parliament imposing these being recited among the list of grievances of the colonies against the crown in the declarations and addresses of the Continental Congress of 1774, notably the Declaration of Rights of October 14th.

Later, Great Britain, being unable to raise revenues throughout the colonies as one, resorted to the expedient, not then new, of partitioning or apportioning or parcelling out quotas to or on the colonies separately ; with the purpose, some said in the colonies, of dividing them against themselves, the more easily to reduce them to " unconditional submission."[1] On May 20, 1775, a resolution of the House of Commons of Great Britain of February 20th of that year, was laid before Congress as follows : " Resolved : That when the governor, council and assembly or general court of any of his Majesty's provinces or colonies in America shall propose to make provision according to the condition, circumstances and situation of such province or colony, for contributing their proportion of the *common defense* (such proportion to be raised under the authority of the general court or general assembly of such province or colony, and disposable by Parliament), and shall engage to make provision also for the support of the civil government and the administration of justice in such province or colony, it will be proper, if such proposal shall be approved by his Majesty and the two Houses

[1] See The Crisis, No. 3, by Thomas Paine, published at this time.

of Parliament, and for so long as such provision shall be made accordingly, to forbear in respect of such province or colony to levy any duty, tax or assessment, except only such duties as it may be expedient to continue to levy or to impose *for the regulation of commerce,* the neat (net) produce of the duties last mentioned to be accredited to the account of such province or colony respectively." This resolution, it appears from the Journal of Congress of May 30, '75, the House of Commons recommended the several colonies to adopt as the basis of a compact. It was believed to emanate from Lord North.

July 31, '75, the Journal of Congress, reciting this resolution of the House of Commons, continues : " The House (Congress) took the said resolution into consideration and are thereupon of opinion : That the colonies of America are entitled to the sole and exclusive privilege of giving and granting their own money ; that this involves a right to deliberate whether they will make any gift, for what purpose it shall be made, and what shall be its amount ; and that it is a high breach of this privilege for any body of men extraneous to their constitutions to prescribe the purposes for which money shall be levied upon them, to take upon themselves the authority of judging of the conditions, circumstances and situations, and of determining the amount of the contribution to be levied. . . . . That the suspension of the exercise of the pretended mode of taxation being made commensurate with the continuance of our gifts, these must be perpetual to make that so. . . . . We are of opinion the proposition is alto gether unsatisfactory because it imports only a suspension of the mode, not a renunciation of the pretended rights to tax us. . . . . Upon the whole this proposition seems to have been held up to the world to deceive it into a belief that there was nothing in dispute between us but the mode of levying taxes ; and that the Parliament having now been

so good as to give up this, the Colonies are unreasonable if not perfectly satisfied ; whereas our adversaries still claim a right of demanding *ad libitum,* and of taxing us themselves to the full amount of their demand if we do comply with it. This leaves us without anything we can call property." It should be observed here that the proposition was that the colonies should bind themselves by *compact* to make contributions, because in former times they had, in fact, made contributions of money, as of troops, which they claimed were made only voluntarily.

The British point of view of this matter is set out, probably as fairly as may be, in Adam Smith's Wealth of Nations, published in 1776. It is there said:[1] "It has been proposed, accordingly, that the Colonies should be taxed by requisition, the Parliament of Great Britain determining the sum which each colony ought to pay, and the Provincial Assembly assessing and levying it in the way that suited best the circumstances of the province. What concerned the whole Empire would in this way be determined by the assembly which inspects and superintends the affairs of the whole Empire, and the provincial affairs of each colony may still be regulated by its own Assembly. . . . Examples are not wanting of Empires in which all the different provinces are not taxed, if I may be allowed the expression, *in one mass,* but in which the sovereign regulates the sum which each province ought to pay, and *in some provinces assesses and levies it as he thinks proper,* while *in others leaves it to be assessed and levied as the respective states of each province shall determine.* In some provinces of France the king not only imposes what taxes he thinks proper, but assesses and levies them in the way he thinks proper. From others he demands a certain sum, but leaves it to the states of each province to assess and levy that sum as they think proper. According to the scheme of tax

[1] Book 4, chap. 7, p. 201 of vol. 2 of J. E. Thorold Rogers's edition.

ing by requisition the Parliament of Great Britain would stand nearly in the same situation toward the colonial assemblies as the king of France does toward the states of those provinces which still enjoy the privilege of having states of their own, the provinces of France which are supposed to be best governed.". . . "The Parliament of Great Britain insists upon taxing the Colonies and they refuse to be taxed by a Parliament in which they are not represented. They are very weak who flatter themselves that in the state to which things have come our colonies will be easily conquered by force alone. The persons who now issue the resolutions of what they call their *Continental Congress* feel in themselves at this moment a degree of importance which, perhaps, the greatest subjects in Europe scarce feel. From shopkeepers, tradesmen and attorneys they have become statesmen and legislators, and are employed in contriving a new form of government for an extensive empire which, they flatter themselves, will become, and which, indeed, seems very likely to become, one of the greatest and the most formidable that ever was in the world."[1] Here it may be observed not only that requisitions were deemed taxation in England, but that the same kind of taxation, as opposed to taxation in the aggregate or "in one mass," existed in France, where the crown went further as to some provinces and administered the tax to the inhabitants of the provinces, assessing the quotas upon, and collecting them from them ; while in other instances assessment and collection was left to the "state of the provinces" to do by their own assemblies.

This method of raising revenue by requisitions for quotas from the constituent bodies was the fundamental principle of the Confederation of the Swiss Cantons, United Provinces of Netherlands, and German Confederation.[2]

[1] Wealth of Nations, pp. 203-4.

[2] Taylor's History of the English Constitution, vol. I.

After the campaign around Saratoga, ending with the surrender of Burgoyne's army in October, '77, was known in England, late in '77, or early in '78, Parliament enacted 18 George III, Chapter xii, for the purpose of removing all doubts and apprehensions concerning taxation in North America. This act, reciting that whereas taxation by Parliament for raising a revenue in his Majesty's colonies, provinces and plantations in North America "has been found by experience to occasion great uneasiness and disorders among his Majesty's faithful subjects, who may, nevertheless, be disposed to acknowledge the justice of contributing to the *common defense* of the Empire, provided such contribution should be raised under the authority of the General Court or General Assembly of each respective colony, province or plantation" relinquished taxation in North America, excepting only *for the regulation of commerce,* the net produce whereof should go to the colonies respectively.

This partitioned taxation of the colonies was used among them as early as 1643, when by the Articles of Confederation forming what was known as "The United Colonies of New England," it was agreed that all charges and expenses of the Union "both in men, provisions and all other disbursements," should be borne by the members of the Confederation in proportion to the *number* of their male inhabitants between sixteen and sixty years of age; each colony, however, taking its own course for raising its quota, rating its inhabitants according to their different estates, but with due allowance and exemption to persons of quality, etc. Here it may be observed that the rule or measure of the quotas of troops and of money of the several colonies was their numbers; the quotas, being mostly of troops for the purpose of fighting the Indians, including only males between sixteen and sixty years of age.

This rule of numbers the Continental Congress adopted when it came to provide for the redemption of its bills of credit issued to carry on the Revolution ; and it partitioned its revenues to be raised into quotas, levying them upon the colonies, and then the states, separately. December 26, 1775, Congress resolved that the united colonies be pledged for redeeming the bills of credit, which it directed to be emitted ; that each colony provide ways and means to sink its proportion of said bills in manner most effectual and best adapted to its condition and circumstances and mode of levying taxes: That the proportion, or quota, of each respective colony be determined according to the number of inhabitants of all ages, including negroes and mulattoes in each colony . . . And that to this end the several assemblies and conventions provide for laying taxes in their respective colonies toward sinking the Continental bills. A similar resolution was enacted yet earlier, on July 29, '75. Here observe the measure or rule of quotas was the whole number of inhabitants, including the negroes and mulattoes. At first the whole number of slaves was included in the rule of numbers.

When the Articles of Confederation and Perpetual Union were agreed upon, Congress was given power to partition or apportion out on the states separately and raise therefrom all moneys required for the common defense and general welfare, as well as troops of war. The eighth article runs as follows : "All charges of war and other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of the common treasury which shall be supplied by the several states in proportion to the value of all land within each state, granted to, or surveyed for, any person, as such land and the buildings and improvements thereon shall be estimated, according to such mode as the United States in Congress assembled shall from time to time

direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and *direction* of the legislatures of the several states within the time agreed upon by the United States in Congress assembled." Congress acquired no power to lay taxes or duties throughout the United States by the Confederation, but the power to require quotas of taxes from the states was without limit.

It will be observed that the measure or rule of quotas here is not as employed by the Continental Congress, that is the whole number of inhabitants including all negroes and mulattoes, but that this rule was relinquished in favor of the rule of the values of all lands within the states, granted or surveyed, with the buildings and improvements thereon.

The reason of the adoption of the rule of values here instead of numbers appears to be as follows : Jefferson's Notes of Debate on the Confederation,[1] say that on Friday, July 12, '76, when the committee appointed to draw the Articles reported them, it was provided therein that "All charges of war and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States assembled, shall be defrayed out of the common treasury which shall be supplied by the several colonies in proportion to the number of inhabitants of every age, sex and quality, excepting Indians, not paying taxes." Then it was moved that quotas should be fixed, not by number of inhabitants of every condition, but by that of the "white inhabitants." Later it was proposed as a compromise, that two slaves should be counted as one freeman. August first, the question being put, the amendment providing that the rule should be white inhabitants only was rejected by the votes of New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey and Pennsylvania against those of Delaware, Maryland, Virginia, North and South Carolina, Geor-

[1] Elliot's Debates, latest edition, vol. 1, p. 70; also Jefferson's Works, vol 1.

gia being divided. The northern states rejected quotas according to white inhabitants, and the southern states would not have quotas according to the whole number of inhabitants, including negroes and mulattoes. Jefferson's Notes are too meagre to show why quotas were finally measured according to values, but Madison's Journal of Debates states that on March 27, '83, Mr. Wilson, who, Jefferson's Notes show, was in Congress and took part in the debate on Art. 8 of the Confederation, said that the southern states would have agreed to the rule of numbers for quotas in preference to the rule of land values if half of their slaves only could have been included in the estimate, but the northern states would not concur in that proposition.[1] The evidence is that the rule of values was substituted for the rule of numbers of the Continental Congress only because it was impossible to reconcile the North and South as to the extent to which slaves should be included.

The following extracts from the Journal evince Congress' view of their constitutional power to require quotas from the states ; and also how in connection with the quotas of taxes there frequently occurs the word *direct* doubly used, and meaning in one case the power of Congress to direct, in the other the power of the state legislatures to direct the same kind of taxation. January 4, '79, resolved " that a committee of one member from each state be appointed to apportion the quotas of the taxes called for to be paid by the several states," for redeeming Continental bills of credit. February 9, '81, ordered that the Board of Treasury lay before Congress the " exact state of the taxes paid in by the respective states." May 22, '81, resolved that the Treasury of the United States be directed to draw orders on the treasuries of the several states for their quotas of $3,000,000, and that it is expected the states will severally *direct* their treasurers to accept those orders as soon as presented.

[1] Elliot's Debates, vol. 5, p. 79.

October 1, '82, resolved that the several states be required to make speedy payment of their respective quotas into the public treasury. October 18, '82, resolved it be impressed on the states as absolutely necessary to lay taxes for their quotas of money for the United States separate from those laid for their own use, and to *pass acts* directing collectors to pay the same to such persons as Congress authorized. October 21, '86 resolved unanimously, that the several states in the Confederacy be, and they are hereby required, to pay into the Federal treasury on or before the first day of June, '87, their respective quotas of the sum, etc. And quotas are indexed as "direct taxes" in the Journal of Congress of 1782-1788,[1] published in 1823.

Upon the nature of the Articles of Confederation and Perpetual Union it is deemed fitting to quote here from opinions of Mr. Madison and Mr. Hamilton upon their binding nature in law since, not only were these gentlemen in agreement on this point, but at the time most of the statements were made the matter was not in controversy.

In No. 38 of *The Federalist* Mr. Madison says (speaking during the time of the Congress of the Confederation): "The present Congress can make requisitions to any amount they please and the states are constitutionally bound to furnish them." In No. 23 of *The Federalist* Mr. Hamilton says: "Congress have the unlimited discretion to make requisitions of men and money. As their requisitions are made constitutionally binding upon the states who are, in fact, under the most solemn obligations to furnish the supplies required of them, the intention evidently was that the United States should command whatever resources were by them judged requisite to the common defense and general welfare." In No. 30 Mr. Hamilton says: "The present Confederation, feeble as it is, intended to repose in the United States an unlim-

[1] Vol. 4 of Journal of American Congress.

ited power of providing for the pecuniary wants of the Union. Congress, by the articles which compose that compact, are authorized to ascertain and call for any sums of money necessary in their judgment to the service of the United States, and their requisitions, if conformable to the rule of apportionment, are, in every constitutional sense, obligatory upon the states. These have no right to question the propriety of the demand, no discretion beyond that of devising the ways and means of furnishing the sums demanded." Again in No. 15 he says: "Except as to the rule of appointment the United States has an indefinite discretion to make requisitions for men and money, *but they have no authority to raise either by regulations extending to the individual citizens of America;* the consequence of this is, that though in theory their resolutions concerning these objects are laws constitutionally binding on the members of the Union, yet in practice they are mere recommendations which the states observe or disregard at their option." Mr. Madison's Journal of Debates in the Congress of the Confederation says that on February 21, '83, Mr. Madison said in debate preceding the passing of the resolutions of April 18, '83, (to be referred to hereafter) that he had observed through the proceedings of Congress that the power delegated to Congress by the Confederation had been very differently construed by different members, which difference of construction had materially affected their reasonings and opinions on several propositions made; that in particular it had been represented by sundry members, that Congress was but an executive body, and he wished the true doctrine of the Confederation to be ascertained in order to remove embarrassment, and to that end would offer his ideas on the subject; and he continued, "That by the Articles of Confederation Congress had clearly and explicitly the right to fix the *quantum* of

revenue necessary for the public exigencies, and to require the same from the states respectively in proportion to the values of the land. That the requisitions thus made were a law to the states as much as acts of the latter for complying with them were a law to their individual members. That the *Federal Constitution* was as sacred and obligatory as the internal constitutions of the several states, and that nothing could justify the several states in disobeying acts warranted by it but some previous abuse and infraction on the part of Congress. That as a proof that the power of fixing the *quantum* and making requisitions of money was considered as a legislative power over the purse, he would appeal to the proposition made by the British ministers of giving this power to the British Parliament, and leaving to the American assemblies the privilege of complying in their own mode, and to the reasonings of Congress and the several states on that proposition. He observed further, that by the Articles of Confederation was delegated to Congress the right to borrow money indefinitely and emit bills of credit, which was a species of borrowing, for repayment and redemption of which the faith of the states was pledged, and their legislatures constitutionally bound." Again, Mr. Madison said about that time: "In fact Congress are already invested by the states with the constitutional power over the purse as well as the sword. . . . . The requisition of Congress on the states for money is as much a law to them as their revenue acts when passed are laws to their respective citizens. If for want of the faculty or means of enforcing a requisition the law of Congress proves inefficient, does it not follow that in order to fulfill the views of the Federal Constitution such a change should be made as will render it efficient? Without such efficiency the end of this constitution, which is to preserve order and justice among the members of the Union, must fail, as without a like efficiency would the end of state constitu-

tions, which are to preserve like order and justice among their respective members."[1] [2]

But the states did not comply with the requisitions of Congress by paying their quotas of taxes, and the United States being heavily in debt for the Revolution, with creditors pressing upon it, yet still requiring more funds, on April 18, 1783, Congress passed the resolutions afterwards so frequently referred to in the convention of '87 as the resolutions of April 18, '83.[3] These resolutions looked to the amendment of the Articles of Confederation, the National Constitution, so-called, recommending to the states, among other things, to establish and appropriate to the United States substantial and effectual revenues for supplying their respective proportions of $1,500,000 annually, to be collected by persons who, though they should be appointed by the states, should be amenable to, and removable by, Congress. Here Congress sought to control the collection of the quotas of the states. The same resolution further provided that, as a *more convenient and certain rule* of ascertaining the proportions to be supplied by the states to the common treasury, the following alteration in the Articles of Confederation and Perpetual Union was agreed to in Congress, and the several states were advised to authorize their delegates to ratify the same as follows : "That Article VIII of the Confederation is revoked and made void, and in place thereof it is declared that charges and expenses incurred for the common defense and general welfare and allowed by

[1] Elliot's Debates, vol. 5, pp. 36-7.

[2] "Congress, by virtue of this delegation, estimates the expense and apportions it out to the several parts of the empire according to their several abilities; and here the debate must end, because each state has already had its voice, and the matter has undergone its whole portion of argument, and can no more be altered by any particular state, than a law of any state, after it has passed, can be altered by any individual. For with respect to those things which immediately concern the Union, and for which the Union was purposely established, and is intended to secure, each state is to the United States what each individual is to the state he lives in. And it is on this grand point, this movement upon one center, that our existence as a nation, our happiness as a people, and our safety as individuals depend." (From The Crisis, No. 11, by Thomas Paine).

[3] They are set out at large in Elliot's Debates, vol. 1.

the United States in Congress, should be defrayed out of a common treasury to be supplied by the states in proportion to the whole number of white and other free citizens and inhabitants, and three-fifths of all other persons not comprehended in the foregoing, except Indians not paying taxes, which number shall be triennially taken and transmitted to Congress in such mode as they shall *direct* and appoint." On the passage of these resolutions of April 18, '83, the ayes and nays being called, twelve states being present (Georgia not), ten states voted "Aye," Rhode Island voted "Nay," New York divided. New York was divided because Mr. Hamilton voted Nay, his reason being, probably, considering his position throughout, that the resolutions did not go far enough. Rhode Island's reasons related, probably, to provision for duties to be laid throughout the United States on imports (to be referred to later), so that on this recurrence to the rule of numbers as the rule of quotas, it seems probable Congress was practically unanimous. By this latter provision Congress sought to return to the rule employed for quotas prior to the Confederation, the rule of numbers; but whereas the rule formerly included all negroes and mulattoes, it was now agreed that but three-fifths of the slaves should be included; they being referred to not as slaves, but as "persons not comprehended in the foregoing" description.

The reasons of the relinquishment of the rule of the values of land and the recurrence to the rule of numbers, are stated in Mr. Madison's Journal of Debates, as follows:[1] January 8, 9, and 10, '83, show that Mr. Hamilton and Mr. Madison were of opinion that the rule was a chimerical one since where the intervention of the individual states occurred their interests biased their judgments, or, at least, suspicions of such bias would prevail, and without their intervention the rule could not be executed but by inadmissible ex-

[1] Elliot's Debates, vol. 5.

pense, delay and uncertainty; and it would, perhaps, be preferable, therefore, to recommend an exchange of this rule for one more simple, easy and equal. January 14 is shown the general strong impression of the committee having the matter in charge, of the difficulty, inequality and impracticability of the rule of values, with their preference for the rule of numbers, and also the advocacy by members of the substitution of the latter rule for the former. March 27 is shown opinions of many members favoring the substitution of the rule of numbers for the reasons before set out, particularly that valuations would always be the subject of contentions among the states. Accompanying the resolution of April 18, '83, in its submission to the states for ratification, was an address by Congress to the states stating:[1] "The last object recommended is a constitutional change of the rule by which the partition of the common burdens is to be made. The expediency and the necessity of such a change have been sufficiently enforced by the local injustice and discontents which have proceeded from valuations of the soil in every state where the experiment has been made, etc." . . . "This rule, tho' not free from objections, is liable to fewer than any other that could be devised. The only material difficulty which attended it in the deliberations of Congress was to fix the proper difference between the labor and industry of free inhabitants and of all other inhabitants." Thus the rule of numbers was restored for its practicality, because it could not be evaded, compromise being reached upon the inclusion of the slaves. It is noteworthy that there is no suggestion anywhere that the quotas of revenue—or of troops—should be equal, although in the Confederation the states had the right of representation as equals, that is, according to the view of Unionists, as equal parts of the whole. Taxation in the Confederation was not according to the same rule as representa-

[1] Elliot's Debates, vol. 1.

tion. Jefferson's Notes of Debates in the Confederation show that much consideration was given, however, to the proposition that the states should be represented in Congress in proportion to their numbers, that is their population; that they should have suffrage therein, not as equals, as equal members of the Union, but as proportional members of the Union.[1]

These resolutions of April 18, '83, also show the attempt to obtain for Congress power to lay duties all one and undivided or united throughout the Union. A former resolution of February 3, '81, recommending the investment of Congress with power to levy certain duties on imports and also on prizes condemned in Admiralty, not having been ratified by the states, was now again insisted upon, it being recommending to the states as indispensably necessary that Congress should have power to levy duties on imports, the collectors of which, though appointed by the states, should be amenable to, and removable by Congress.

It was during debate preceding these resolutions of April 18, '83, that motion having been made looking to Congress acquiring power to lay taxes throughout the Union, which were called Continental taxes, or general taxes,[2] or collective taxes, as distinguished from apportioned taxes, sometimes called individual taxes, that Mr. Madison's Journal tells us:[3] "Mr. Hamilton went extensively into the subject; the sum of it was as follows: he observed that funds considered as permanent sources of revenue were of two kinds; first, such as would extend generally and uniformly throughout the United States, and would be collected under the authority of Congress; secondly, such as might be established separately within each state, and might consist of any objects chosen by the states, and might be collected either under the authority of the states or of Congress."

[1] Elliot's Debates, vol. 1; Jefferson's Works, vol. 1; and Mr. Madison's Journal, June 11, 1787; Elliot's Debates, vol. 5, p. 181.

[2] See Resolutions of Congress, Feb. 15, 1786, vol. 4, pp. 618, 619, 620; also April 21, 1781.

[3] Page 33.

This quotation from Mr. Hamilton is not made because he said it, or because Mr. Madison summed it up, reporting it, but merely in illustration, as a fine analysis of the power of taxation later conferred upon Congress in forming more perfect union. Here are the features of the revenue power of a republic rearing herself upon her many states in process of becoming a perfect union. Funds considered as permanent sources of revenue, or in other words, the power of the purse, or the power of taxation being of two kinds, (1) such as would extend generally and uniformly throughout the Union and be collected by authority of Congress, (2) such as might be established separately in each state on any objects chosen by the state, and might be collected by authority of the states or by Congress: the first kind is determinate, it being said what *would* be; the second kind is indeterminate, it being said what *might* be. Each has three particulars, the first kind being determinate in respect that the funds (1) extend throughout the United States, (2) are uniform, and (3) are collected by authority of Congress; the second being indeterminate in respect that, (1) the funds might be established separately in each state, (2) might be from objects chosen by the states, (3) might be collected by the states or by Congress. The first kind denotes the determination of union in all respects, taxes extending throughout it on the same subject matter uniformly, and collected by authority of Congress; and the second denotes the indetermination of union, the doubt of the supremacy of the states or the Union, taxes being drawn separately from each state, whereby they might be held or controlled by the states in their treasuries, or by Congress in the national treasury, and both assessment and collection might be by the states or by Congress.

It may be observed here that from the nature of things it would appear that all empires, republics or nations arising from their constituent bodies or com-

ponent members, as England upon her shires or counties, France upon her states of the provinces, Rome from her provinces, will give evidence of it in the history of their revenues as well as of their troops of war; that at first these are separate contributions from the several local governments, who call them voluntary and assess them upon, and collect them from their inhabitants themselves; but, as the power of the nation becomes supreme, this voluntary contribution becomes involuntary tribute, derived still from the component bodies, provinces or states, as it must be, but in either of two modes or ways; first, in manner as before as near as may be, by the money or troops to be raised being partitioned or apportioned out in accordance with the partitions between the several component members into shares or quotas, which are gross quantities of money or troops, one quota being laid or charged to or upon each constituent member; and requisition therefor may be directed to its governmental authorities, who are then to administer it to the inhabitants, assessing it upon their property or persons and collecting it therefrom; or the national legislature may itself, as an additional measure, administer the quotas to the inhabitants of the provinces or states and make the assessment and collection. The other way is for the national legislature to disregard its members and all partitions between them, and without apportioning the revenues or troops to be raised, to levy and collect them throughout the Union as one undivided or united body politic or state.

Either mode of deriving tribute obtains it from the component members of the Union, which can derive its resources only from its members, being composed of them, but the former method acts upon them as political beings such as first made voluntary contributions, making them the object of its imposition, while the latter method ignoring them as political beings and going through them all as one constituency

strikes at each member only in effect or by consequence. One mode is direct, the other consequential.

Prior to the convention of 1787 the resolutions of Congress of April 18, '83 never having been ratified, Congress had no power to levy taxes save on the states, and no power to administer the quotas of the states to their inhabitants by assessing and collecting them therefrom. Moreover, the change of the rule of quotas from values to numbers may have remained unconfirmed, though the report of the Secretary of Congress of January 4, '86, is said to show eight states had then ratified the amended eighth article, on quotas.[1]

Proceeding to the convention of 1787, the Virginia plan, the convention in committee of the whole, the Jersey plan, and the convention all resolved that the national legislature should have the legislative rights vested in Congress by the Confederation. This necessarily carried power to require quotas of money, as of troops, from the several states.

Moreover—to repeat somewhat—the Virginia plan proposed that the representation from the states or their suffrage in the first branch of the national legislature should be either according to their quotas of contribution, or their numbers of free inhabitants, and that the rule should obtain in both branches. By this proposal that the states should be represented in proportion as they contributed, the Virginia plan expressed the principle of the British constitution which caused the Revolution, the principle that representation and taxation of the members of the empire should go hand in hand, and be proportioned the one according to the other; and proposing, in the alternative, the number of free inhabitants as the rule, the plan implied that rule of quotas which was the alternative of the number of free inhabitants, the rule of the number of free inhabitants and three-fifths of all others, the rule of the Confederation amended, as aforesaid.

[1] See Jefferson's Works, vol. 1.

If the first alternative were accepted, the principle of the Revolution, of representation of the members of the Union according to their taxation, and the rule of the Confederation amended, the rule of the whole number of free inhabitants and three-fifths of all others, would be adopted; if the second alternative were accepted both the principle and the rule would be denied. The convention in committee of the whole accepted the first alternative, adopting both the principle and the rule, but expressing only the rule, the principle being only implied; resolving that representation from the states should be not as in the Confederation, but according to the whole number of free inhabitants and three-fifths of all others, in the first branch of the national legislature, and in the second branch the same. The convention in convention followed the committee of the whole as to the first branch, but expressed both the principle and the rule, it is submitted, in its resolution that representation should be according to direct taxation in the first branch, censuses to be taken from time to time according to the rule of the resolution of April 18, 1783, the rule of the Confederation amended, and both direct taxation and representation to be proportioned accordingly; but they resolved that in the second branch of the legislature each state should have equal vote, and all bills for revenue should originate in the first branch, and not be altered or amended by the second.

By the Jersey plan representation from the states was not to be according to their contributions,—in the single chamber of legislation of this plan,—the principle of the Revolution was not followed, but representation was to be as in the Confederation, the several states having equal suffrage; but contributions from the states were to be according to the Confederation amended, the whole number of free inhabitants and three-fifths of the slaves. This plan putting taxes to the front,—immediately after the

resolution for revising the Articles of Confederation—recognized in two paragraphs two kinds of taxes, those extending throughout the Union, and those apportioned to the several states; offering in one paragraph to confer on Congress authority to raise revenue by import duties, by stamp duties on paper, vellum, and parchment, and by postage, and to make rules—not to direct collection, for the word "direct" is never used in reference to unapportioned taxes—for the collection thereof; and in the other paragraph offering that the rule of quotas of contribution—the right to which it conferred in the provision that Congress should have the legislative rights vested in Congress by the Confederation—should be as agreed upon by the resolution of April 18, 1783, and with power in Congress to *direct* collection in non-complying states, and to *pass acts directing* the same.[1]

Now, it appearing that taxes are of two kinds both inherently and historically, those apportioned or parcelled out to or on the constituent bodies or component members separately, and those extending one and undivided throughout them all united, it is considered that the former are direct taxes for the following reasons: The former are taxes to and upon the several members directly, the latter only indirectly or consequentially; the former are proportioned according to representation from the constituent bodies by the British constitution, the denial whereof to the several colonies and the assertion of the right to tax them without representation—both kinds of taxes being attempted—brought on the Revolution; and new union being formed of America wherein the several colonies acquired the representation denied to them by the United Kingdom and became represented equally, Congress exercised, and by the Confederation and Union acquired the right to taxes of the former kind from the several states as constituent members, the rule or measure being at first the whole number of

[1] Resolutions 2 and 3.

inhabitants including slaves, and later by amendment of the Confederation the number of free inhabitants and three-fifths of the slaves—thus compromising the interests of the North and the South; and more perfect union coming to be formed the Virginia plan, the committee of the whole house, the Jersey plan and the convention in convention all agreed in conferring on the national legislature the power Congress had by the Confederation to levy taxes of the former kind from the several states; then the Virginia plan proposed representation according to either the quotas of contribution or the numbers of free inhabitants, thus on the one hand pursuing the principle of the Revolution and the amended rule of the Confederation, or on the other hand denying both; the committee of the whole accepted the first alternative; then the Jersey plan proposed representation as in the Confederation by the states equally, and furthermore proposed the two kinds of taxes aforesaid, the former kind according to the amended rule of the Confederation; then the convention in convention resolved unanimously that representation should be according to direct taxation, and both according to the rules of the Confederation amended, but compromised with the Jersey plan by conceding representation in the second branch as in the Confederation. Finally direct taxes appear by authorities on the British constitution to be taxes on the several constituent bodies, the counties of England.[1]

Such would appear to be the primary meaning of direct taxes. But there appears a secondary meaning of great practical importance in the convention. As will be observed later, and as has always been recognized, the most important power conferred on the national legislature by the convention was power to execute and administer the power formerly vested in Congress by the Confederation. By this Congress might administer the quotas of the several states to

[1] Gneist's History of the English Constitution, vol. 2, p. 4; and Blackstone says direct taxes are assessed on the counties — book 1, chap. 8.

the people thereof, assessing the amounts upon and collecting them from them, whereby the money would go directly into the treasury of the United States, instead of through and by way of the states' treasuries as in the Confederation ; and such was the practical necessity of this power to the Union that this secondary meaning was perhaps the better recognized. Montesquieu applies the word " direct " to the administration of taxes apportioned on constituent bodies in speaking of quotas to the provinces assessed upon and collected from their inhabitants by the Roman empire. " By this," he says, " the public money passes through few hands, goes *directly* to the treasury " and makes quicker return to the people.[1] And Blackstone says direct taxes are apportioned out to the counties or shires of England, then assessed on their inhabitants, their real and personal property, the usual form being the land-tax, but with poll-taxes at times.[2] Moreover, as observed from Adam Smith, France apportioned out taxes to the provinces in contrast to taxing them " in one mass," deriving the practice from the Roman empire which did the same, first making requisitions for quotas to the provinces, but later administering the quotas to the inhabitants thereof, such taxes being called direct taxes.[3]

But, as will be observed later, the Jersey plan was framed upon the theory that the United States was supreme over the several states only within limits set ultimately by the several states, whereof the consequence would be that the several states would be really and in truth, because ultimately, supreme over the United States. According to this theory the contributions of the several states to the United States would be but voluntary contributions which the United States in Congress assembled had the right

[1] Montesquieu's Spirit of Laws, book XIII, chap. 19, Pritchard's edition, vol. 1, p. 236.

[2] Black. Com., book 1, chap. 8, p. 313.

[3] The Decline and Fall of the Roman Empire, by Edward Gibbon, first publication 1776; 1782-3; ch. 17; Victor Duruy's History of Rome, Ripley and Clarke's translation, vol. 6, p. 252; vol. 2, p. 239.

only to "direct and appoint" by the Confederation, and which by the Jersey plan Congress would in addition only direct the collection of in non-complying states, and pass acts directing the same. Such would appear to be the interpretation of the Jersey plan.

So direct taxes might be construed in either of two ways, according to the Virginia plan, the resolutions of the convention in committee of the whole and in convention, that is for the supremacy of the United States on the one hand, or according to the Jersey plan and the ultimate supremacy of the several states on the other. This aptitude to either interpretation denotes the indefiniteness or the indeterminateness of union of the former analysis by Mr. Hamilton, and accords with the alternative nature of the constitution throughout, as will appear later. According to the former interpretation direct taxes would be those apportioned to the several states, being contributions from them severally and directly, instead of from them indirectly or consequentially, as in the case of taxes or duties extending throughout the United States; and moreover Congress might administer the quotas to the inhabitants, assessing them upon and collecting them therefrom, whereby they would flow directly into the treasury of the United States. But by the latter interpretation direct taxes, though apportioned to the several states, were but voluntary contributions from them, which Congress might direct and appoint, and direct collection of in non-complying states, and pass acts directing the same.

THROUGH THE CONSTITUTION IN BLOCK.

Recurring to the comparison of the resolutions of the convention—as to the executive, the Virginia plan proposed that a national executive be instituted to be chosen by the national legislature for a term of years, with fixed compensation, and to be ineligible a second time; who besides enjoying the executive rights vested in Congress by the Confederation should have general authority to execute the national laws.[1]

This resolution the committee of the whole adopted, with the addition that the executive should be a single person, his term seven years, and that he should be removable by impeachment. The executive rights vested in Congress by the Confederation being included in the general authority to execute national laws, expression of the former was omitted; but particular authority was conferred to appoint to offices in cases not otherwise provided for.[2] The convention sitting in convention adopted the resolution from the committee of the whole.[3] This was according to the constitutions of Great Britain and of the several states, yet developing the executive out of the presidency in the Confederation. Blackstone calls the crown an executive consisting of a single person, with general authority to execute the laws.[4] So it was with the governors and presidents of the several states; and among the powers of the executive were the executive powers vested in Congress by the Confederation, including power to make appointments to offices. In the Confederation Congress chose the pres-

1 Resolution 7.
2 Resolution 9.
3 Resolution 12.
4 Black. Com., Introd., sec. 2, and book 1, chap. 7.

ident; of course the British executive was hereditary, yet Parliament appointed William and Mary, thus establishing the right to regulate the succession in extraordinary emergencies such as then occurred; and prior to that, Henry IV confirmed his title by act of Parliament.[1] The abrogation of the British principle of heredity and the substitution of election by the people by their representatives was the main difference between monarchy and republicanism; the other being the abrogation of the principle of heredity and the substitution of the principle of election by the people by their representatives in the upper house of the legislature.

The Virginia plan proposed that the executive and a given number of the judiciary form a council to revise all acts passed by the national legislature before their operation, both those enacting national laws and those negativing state laws, and that the dissent of this council should amount to a rejection of the acts unless again passed by the national legislature by a given number of each branch.[2] The convention in committee of the whole, omitting the judiciary from the revision, committed it wholly to the executive, and inserted two-thirds as the number of each branch of the national legislature to be required to pass acts over the executive negative, or veto; providing that the executive might negative all acts of the national legislature—both those enacting national laws and those negativing state laws—not again passed by two-thirds of each branch of the national legislature.[3] The convention sitting in convention adopted the same by unanimous vote.[4] The council of the executive from the judiciary appears to have answered to the council from the judiciary to the British executive set out by Blackstone among

[1] 7 Henry IV, chap. 2.
[2] Resolution 8.
[3] Resolution 10.
[4] Resolution 13.

the executive councils, but it was not adopted, the executive being strengthened by the "veto power," so called, to himself alone. According to Blackstone, the British executive had an absolute negative on the acts of Parliament;[1] yet it appeared in convention that this negative had not been exercised since the revolution of 1688; and the negative subject to two-thirds of each branch of the legislature was pursuant to the constitution of New York,[2] which was the latest made among the constitutions of the several states, and had restored, most nearly, the executive power which prevailed in the colonies before the abuses of the crown and the crown governors aroused that jealousy of the executive power which is shown in the earliest state constitutions.

As to the judiciary the Virginia plan proposed that a national judiciary be established to consist of a supreme tribunal and inferior tribunals, to hold their offices during good behavior, with compensation fixed and not subject to diminution during their term; and jurisdiction of piracies and felonies on the seas, captures from an enemy, cases where foreigners or citizens from other states applying to such jurisdiction should be interested, cases respecting collection of national revenue, impeachments of national officers and questions involving the national peace and harmony.[3]

The committee of the whole adopted the proposal of the Virginia plan as to the supreme tribunal, adding that it should be chosen by the second branch of the legislature, and omitting certain clauses of the jurisdiction, to-wit: piracies and felonies on the seas, captures from an enemy, cases of foreigners and citizens

[1] Black. Com., book 1, p. 154; 261-2.

[2] But there the Council to the Governor assisted in the negative.

[3] Resolution 9. It is noticeable here that in the recital of the Virginia plan in Mr. Madison's journal of the debates of the convention it is added that it was proposed therein that the judiciary should be chosen by the national legislature; but that provision is not in the recital of the plan in the official journal.

of other states as aforesaid; and, as to inferior tribunals, providing that the national legislature should be empowered to appoint them.[1] The convention sitting in convention adopted the same, save that it was resolved as to the jurisdiction of the supreme tribunal that it should extend to cases arising under laws passed by the general legislature and to questions involving national peace and harmony.[2]

Here the judiciary corresponds to that of England and the several states in respect of the supreme tribunal, their independency, and their jurisdiction, yet it is developed out of the judiciary of the Confederation; for by the Confederation jurisdiction was exercised in cases of piracies and felonies on the seas, and cases of captures from an enemy—and courts of the Confederation were appointed by Congress—and the other cases added, respecting collection of national revenue and where foreigners and citizens of other states were interested, were particularly required at that period, as will later be observed. But jurisdiction extending to cases arising under laws passed by the general legislature and to questions involving national peace and harmony was a general jurisdiction, including, it may be submitted, the particular cases omitted, their omission at this time being, it would appear, for that reason. Blackstone speaks of the court of king's bench as the supreme court. It had jurisdiction of all civil and criminal cases—though of course only at law, equity jurisdiction being exercised by other courts. Jurisdiction of questions touching the national peace and harmony was later omitted, but it would appear to be pursuant to the legislative power conferred in cases where the states were separately incompetent or their individual legislation would interrupt the harmony of the Union. As to the independency of the judiciary, the provisions for term of office during good behavior, with compensation not

[1] Resolutions 11, 12, and 13. [2] Resolutions 14, 15, and 16.

subject to diminution, arose in England, appearing thence in the constitutions of the several states, as has been observed; and it is noteworthy that these provisions for the independency of the judiciary were considered in convention separate from all others and so passed unanimously.[1]

The next resolution, the Virginia plan, the resolutions of the convention in committee of the whole and again in convention all contained: Resolved that provision ought to be made for the admission of new states lawfully arising within the *limits of the United States,* whether from a voluntary junction of government and territory, or otherwise, with the consent of a number of voices in the national legislature less than the whole.[2] It is considered here that by " limits of the United States " is meant the limits of America, the United States being the United States of America, and the reasons for this will now be set out, only remarking in addition that provision for the admission of new states was pursuant to the Confederation as evidenced by the ordinance of 1787 enacted by Congress for the government of the territory northwest of the river Ohio, July 13 of that year; and also by the resolutions of Congress respecting the admission of Kentucky: for June 2, 1788, Congress in committee of the whole resolved upon the erection of Kentucky as a state and its admission into the Union " in mode conformable to the Articles of Confederation; " but later, July 3d, 1788, the Constitution having been ratified, Congress resolved that the admission of Kentucky ought to be under the new government.

[1] July 18th.

[2] Virginia plan, resolution 10, committee of the whole, resolution 14, convention in convention, resolution 17. It will be observed that the phrase "limits of the United States" appears also in other places; see resolution 8 of resolutions of convention in convention and article 4, section 4, of the first draft of the Constitution.

In inquiring what are the limits of the United States[1] within the meaning of the above resolutions of the convention it will be observed that by this must be meant the limits of the United States or the limits of the Union *in law* rather than in fact at that or any other time, that is to say the limits according to the design and plan and purpose of the Union, in a word the constitutional limits of the Union, for such only were within the consideration of the convention. The constitutional limits of the Union must lie beyond the then present actual limits because within the ac tual limits of the Union there could be no further junction of territory or of government, voluntary or otherwise. The actual limits, or the actual dimensions of the Union at the time of the adoption of the constitution are stated by Mr. Madison in *The Federalist,* No. 14, his statement serving to contrast the actual limits with the constitutional limits. He there says "that we may form a juster estimate . . . let us resort to the *actual dimensions* of the Union. The limits as fixed by the treaty of peace with Great Britain are: on the east the Atlantic; on the south the latitude of 31 degrees ; on the west the Mississippi; on the north an irregular line running in some instances beyond the 45th degree, in others falling as low as the 42d degree." Government for most of this territory was provided by the ordinance of 1787.

To consider the limits of the Union according to its design and plan: in the British statutes the colonies of Great Britain were mentioned as the colonies, provinces and plantations in North America, or in North America and the West Indies.

Thus, the act of Parliament 18 George III, page 12, (1778), was entitled, "An act for removing doubts and apprehensions concerning taxation by the Parliament of Great Britain in any of the colonies, provinces and plantations in North America and the West Indies." Accordingly on the assembling of the Con-

[1] From an article by the writer on the Limits of the Union.

tinental Congress at Philadelphia, September 5, 1774, the first entry in the Journal was: The delegates "chosen and appointed by the several colonies and provinces in North America to meet and hold a Congress" assembled, etc. From this time until they assembled under the Articles of Confederation and Perpetual Union, Congress was always called "The Continental Congress," or "The American Congress," for the reason, it may be submitted, that they were legislating for the continent, or for America. The official title of the Journal is, "The Journal of the American Congress."

From the Journal it appears that Congress sought to unite all the British colonies in America ; thus, October 21, '74, Congress resolved upon preparing addresses to Nova Scotia, St. Johns, East and West Florida. October 26, '74 Congress issued an address to the inhabitants of the province of Quebec appealing to them to unite with the others. April 8, '75, and March 20, '76, instructions were given commissioners sent to Canada to treat for adopting "the people of Canada into our Union as a sister colony, with the same general system of laws as the other colonies, with only such local differences as might be agreeable to the people of each colony respectively." July 25, '75, an address was issued to the Assembly of the Island of Jamaica. November 22, '75, Congress provided for supplying the people of the Bermuda Islands with provisions, they "seeming friendly to the cause of America," and suffering from the non exportation agreement of those colonies which had already united.

A reason for the British West Indies not uniting is indicated by the statement of Lord John Sheffield in his Observations on the Commerce of the American States, published shortly after this, wherein he says,[1] writing, of course, from the English point of view: "Our islands if declared independent could not pro-

[1] Page 188.

tect themselves, nor is there a probability that the American states will have a navy sufficient for the purpose." But though Congress may not at that time have been able to command a navy sufficient for the purpose of establishing the independence of the West Indies, yet November 28, '75, they adopted rules for the regulation of the " navy of the United Colonies of North America." July 6, '75, Congress issued an address to the inhabitants of Great Britain entitled, " The Declaration of the Representatives of the United Colonies of North America."

It is in the second Continental Congress on May 16, '75, that there appears of record for the first time the conception of *United America.* On that date Congress resolved itself into a committee of the whole house " to consider of the *state of America.*" After that time the Journal shows that Congress went frequently into a committee of the whole house to consider of the " state of America." May 10, '76, Congress recommended to the assemblies, or conventions, in the several colonies, to set up such governments as should, in the opinion of the representatives of the people, be deemed most conducive to the happiness and safety of " their constituents in particular and America in general." Here it is observable that Congress considered the several colonies as particular constituents of America in general, as the quotations show they sought to consider Canada, Jamaica, Bermudas, etc.

July 4, '76, the word " states " appears for the first time ; it is no longer the United Colonies, but the United States; and it was never the United States of North America, but the limitations implied in the word " North " were dropped finally and thenceforth the name and style of the new power is the United States of America; the Declaration of Independence is by Congress styling themselves " We, the representatives of the United States of America, in general Congress assembled."

Though Congress did not seek to unite as states and absolve from allegiance to the old world any but the British colonies in America, there is evidence that at the very date of the Declaration of Independence they anticipated the time when Spain and France would be stripped of their colonies in America, they to be embraced in the Union; but manifestly this would not be proclaimed to the world at a time when Spain and France were sought as allies with whom to establish independence of Great Britain; and France made treaty of alliance with the new power at once. Yet Mr. Jefferson,—who it is needless to recall wrote the Declaration,—writing out the debates in Congress of the time of the Declaration of Independence, says that it was therein declared on June 8, 1776, "that France and Spain had reason to be jealous of that rising power which would one day certainly strip them of all their American possessions." And some time later Mr. Jefferson, in a letter from abroad, wrote "Our confederacy must be viewed as the nest from which all America, north and south, is to be peopled."[1] Perhaps President Jefferson bore in mind the limits of the Union when he assumed to make the Louisiana purchase, for there, indeed, the only question would appear to be, not whether the government might acquire, but which department of the government, the executive or the legislative, should make the acquisition; still, in the meantime, Mr. Jefferson had gone with the states' rights party.

November 15, 1777, the Articles of Confederation and Perpetual Union were agreed upon in Congress, the preamble reciting the making to be in "the second year of the independence of America;" and likewise the ratification is stated to be in "the third year of the independence of America." Article I is "The style of this Confederacy shall be the United States of America." Article XI is "Canada acceding to this Confederation and joining in the measures of the

[1] Jefferson's Works, vol. 1, pp. 11, 433.

United States shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same unless such admission be agreed to by nine states." By the phrase "no other colony" would appear to be meant no other colony in America, although no doubt reference was had particularly to British colonies.

The convention of 1787, according to the Journal, went into committee of the whole house every day until the work of the committee was done "to consider of the state of the American Union." Consideration of the state of the American Union in committee of the whole house succeeds to consideration of the state of America in committee of the whole house of the old Congress, provided the American Union is the Union of America. If the limits of the Union are identical with the bounds of America then the word "of" in the style "the United States of America" has the meaning of identity or co-equality which meaning the dictionaries state that it has, especially when used with names, as in the phrase to be found in Webster "the continent of America." Or the word may denote possession or ownership or sovereignty. Nothing is more usual through all the debates in the convention than the use of the words "United States" and "America" interchangeably. They are used as of the same or equal meaning throughout. Indeed if the name is to be abbreviated it would accord more fully with the language of the convention to speak of the Constitution as the Constitution for America than to speak of it as the Constitution for the United States. And it may be observed here, though perhaps somewhat prematurely, that the first draft of the Constitution from the committee of detail, copying after the Articles of Confederation and Perpetual Union says "The style of this government shall be 'the United States of America.'" In the revised draft this is omitted, but instead the preamble declares "We, the people of the United States . . . ordain and

establish this constitution for the United States of America." And the executive power is vested in a "President of the United States of America."

Along with these records all the history of the period is evidence that the cause of the colonies throughout the Revolution was conceived to be the cause of all America, the cause of the continent, the cause of the new world ; and that the real significance and import of the war was the separation of America from the old world and the independence of America. Thomas Paine, beginning number 15 of *The Crisis,* in April, 1783, says "The times that tried men's souls are over . . . and the greatest and completest revolution the world ever knew is gloriously and happily accomplished . . . . Our great title is Americans ; our inferior one varies with the place." Mr. Bancroft in his history, speaking of the period of the second Continental Congress in 1775 says "The Americans were persuaded that they were set apart for the great duty of establishing freedom in the new world and setting up an example for the old." After Congress conferred power upon General Washington to raise an army throughout all the United States regardless of the several states' militia and to take property for its use regardless of consent, only making compensation therefor in Continental Currency, Washington was styled "Dictator of America." The United States of America was not without example. Very likely Congress had in mind that the executive of Great Britain styled himself in all the charters to the colonies "By the grace of God, of Great Britain, *France* and Ireland, King." Would it not appear otherwise than natural if the constitution were not designed for America? If within the meaning of the foregoing resolutions of the convention the limits of the United States are not the bounds of America, what are they? [1]

[1] According to this is the District of *Columbia* the name of the seat of the Government of America.

The Virginia plan resolved that republican government and the territory of each state ought to be guaranteed to each state by the United States;[1] the committee of the whole altered this to a guaranty of republican constitution and existing laws;[2] the convention in convention made it a guaranty of republican form of government and protection against foreign and domestic violence.[3] This was pursuant to the first object of the Union, the common defense, that each part of the Union should have the benefit for defense of the force of the whole. By Article 3 of the Confederation and Union the states were obligated to assist each other against force offered to or attacks on any of them on any pretense. Common defense against foreign violence was the object of Congress in the Revolution; and protection against domestic violence and the guaranty of republican form of government were occasioned by the memorial of the government of Massachusetts to Congress, received and entered in the Journal March 9, 1787, only two months prior to the assembling of the convention, concerning aid for the purpose of suppressing Shays' rebellion in that state.

The Virginia plan proposed, and the committee of the whole adopted the resolution that provision ought to be made for the continuance of Congress and their authorities and privileges until a given day after the reform of the articles of union should be adopted and for the completion of all their engagements.[4] The convention in convention omitted this provision but it was taken up again later, the Constitution providing, as will be observed, that all engagements entered into and debts contracted before the adoption thereof shall be as valid as under the Confederation.[5] And this was pursuant to the Articles of Confederation and Union which provided[6]

[1] Resolution 11.
[2] Resolution 16.
[3] Resolution 18.
[4] Resolutions 12 and 15 respectively.
[5] Article 6.
[6] Article 12.

that debts contracted by or under the authority of Congress prior to their assembling pursuant to the Confederation should be a charge against the United States; thus validating the acts of the Continental Congress, the debts contracted whereby were by far the heaviest engagement. Moreover, the convention also made provision later for the introduction of the new government.

The Virginia plan, the committee of the whole and the convention in convention all resolved that provision should be made for amending the articles of union whenever necessary.[1] Such a provision also appeared in the Confederation.[2]

The Virginia plan, the committee of the whole and the convention in convention all resolved that the legislative, executive and judiciary within the several states ought to be bound by oath to support the articles of union. This was required by the British government of the officers of the several colonies, as appears in the preamble to the resolution of Congress, of May 15, 1776, recommending to the several colonies to set up state governments for their constituents in particular and America in general, which has been already set out. It recites that it is now irreconcilable to reason and good conscience for the people of the colonies to take the oaths or affirmations necessary to support government under the crown of Great Britain. The committee of the whole and convention in convention added provision that this oath should be taken by the same officers of the national government, which provision was in accordance with the several states and the British government.[3]

The Virginia plan, the convention in committee of the whole and in convention resolved that amendments offered to the Confederation by the convention

[1] Resolutions 13, 17, and 19 respectively.

[2] Article 13.

[3] For oaths of allegiance in England with religious tests, prohibition against which was yet to be inserted in this connection in the Constitution, see 30 Car. 2, st 2; and 7 Jac. 1, chap. 6.

ought at the proper time after approbation by Congress to be submitted to an assembly or assemblies of representatives recommended by the several legislatures to be expressly chosen by the people to consider and decide thereon.[1] This accords with the theory of the nature of the Union heretofore set out, that the states stand as they came into being, jointly and severally, the government of the Confederation and Union having been made by the states jointly and ratified by them severally, the states jointly being represented by Congress and severally by their legislatures respectively. But as a new government was to be made for the states jointly by reason that the old government was inefficient and the several governments too dominating for the preservation of the balance and equilibrium between the general and the local governments, it was advisable that the new government should be set free of the inefficiency of Congress and the domination of the several governments by being made by the states jointly, not by Congress, but by convention chosen for that purpose and ratified and confirmed by the states severally, not by their legislatures, but by conventions chosen for the purpose by the people thereof; yet this should have the authority of Congress and the several legislatures; hence the resolution that the amendments offered to the Confederation and Union by the convention ought, after approval of Congress, to be submitted to an assembly or assemblies of representatives recommended by the several state legislatures, to be expressly chosen by the people to consider and decide thereon.

All the resolutions of the Virginia plan, the convention in the committee of the whole house and the convention sitting in convention have now been gone over, except the last two resolutions of the convention in convention, numbered 22 and 23. Number 22 provided that the representation in the second branch of the

[1] Resolutions 15, 19, and 21.

legislature should consist of two members from each state who should vote per capita; which was according to the aforesaid compromise giving each state equal vote in the second branch. Number 23 provided for qualifications of property and citizenship for members of the legislative, executive and judiciary. Qualifications of citizenship will appear later, as will the provisions of number 22. Qualifications of property were afterwards omitted.

On July 26 then, some ten weeks after the date for the assembling of the convention, and two months after business was begun, the resolutions of the convention were finally agreed upon, having been gone over in committee of the whole house and reported therefrom to the convention twice, once before and once after the rejection of the Jersey plan, and having been again gone over in convention. The convention was then about two-thirds through the period of its existence and its resolutions taken together make up the Constitution in block or in mass—if the expression may be used in contrast to the constitution in detail—as it stood at that time, as follows: It will be observed of the legislative, judiciary and executive that each is considered with respect of (1) what it consists of, and (2) of its powers.

The government of the United States was to consist of legislative, judiciary and executive which should be supreme; the legislative, being taken up first, should have two branches, the first branch to be chosen by the people of the several states, the second by the several legislatures—provisions being made for the duration of the term of office of members of both branches, their age, compensation, ineligibility to other office, etc.—and each branch should originate acts of legislation; the power of the legislature should be that

vested in Congress by the Confederation and in all cases for the general interests of the Union, and where the separate states were incompetent or their legislation would interrupt the harmony of the Union; and the acts and treaties of the United States pursuant to the articles of Union should be the supreme law for the respective states. Representation from the several states or their suffrage as members of the Union in the first branch of the legislature should be according to direct taxation, which should be according to the whole number of free inhabitants of the several states and three-fifths of the slaves, to be ascertained by census every ten years; and the first branch should originate all bills for raising or appropriating money, which should not be altered or amended by the second branch; but in the second branch of the legislature the several states should vote equally, each having two votes. The executive should be a single person chosen by the legislature for seven years, with fixed compensation and ineligible a second time; with power to execute the national laws, to appoint to offices and to negative laws not passed over him by two-thirds of each branch of the legislature, and removable by impeachment. The judiciary should consist of a supreme tribunal appointed by the second branch of the legislature, to hold office during good behavior, with fixed compensation; their jurisdiction to extend to cases arising under laws of the general legislature and to other questions involving national peace and harmony; and the national legislature was empowered to appoint inferior tribunals. Provision was made for the admission of new states arising within the limits of the United States; for guaranteeing to each state a republican government and against violence; for amending the articles of union and for ratifying the present amendments to the Confederation; and for the oaths of state and national officers to support the Union.

In all these provisions the convention had proceeded in accordance with either the constitutions of Great Britain and of the several states,—the latter being modeled upon the former *mutatis mutandis* through the charters of the several colonies,— or the Articles of Confederation and Perpetual Union. Moreover, the convention had proceeded in accordance with these precedents in very noticeable agreement, the convention in committee of the whole having reported the Virginia plan to the convention with but little exception, and, after rejecting the Jersey plan, having again reported the same, and the convention in convention having adopted the report with few further exceptions.

There was some addition to the Virginia plan by the convention in committee of the whole; thus a blank was left in the composition of the executive[1] which the committee filled in with provision that it should be a single person for a term of seven years, but removable by impeachment; and to his general executive power they added power to appoint to offices. In these additions the convention in convention concurred. There was also some alteration by the committee of the whole; the Virginia plan that the executive with a number of the judiciary compose a council to revise and negative laws before their operation gave way to provision for the exercise of this power by the executive alone. In this also the convention in convention concurred. Then the convention in convention omitted the word "national" by unanimous vote; altered the negative on state laws from an express to an implied negative; the guaranty to the several states was altered somewhat; and there were minor changes of form. Yet taking the instrument entire it may be submitted that the convention in committee pursued the Virginia plan and reported it to the convention, and again in convention pursued and adopted the report with few exceptions.

[1] This was no doubt owing to the jealousy of the executive consequent upon the abuses of the crown and crown governors, as is observed elsewhere.

The great exception—perhaps, beside the omission of the word " national "—was the composition of the second branch of the legislature, as has always been recognized. The Virginia plan would have chosen this branch by the first branch out of nominations by the several legislatures, with the rule of representation the same as in the first branch; but the convention in committee altered the choice of members, providing that it should be by the several legislatures, and the convention in convention altered the rule of representation, providing that it should be equal from the states, each having two votes. Thus the second branch was composed as in the Confederation and Union in respect of both the choice of members and the rule thereof, and this, coupled with the omission of the word " national' made up the concession of the convention to the Jersey plan of government.

But this concession was enough to remove the chief objection of the adherents of the Jersey plan to the resolutions of the convention, because it sufficed to compromise the chief point of difference between the Jersey plan on the one hand and the Virginia plan and the resolutions of the convention on the other, and to leave the constitution open to interpretation to the former. This will appear upon examination of the Jersey plan.

THE JERSEY PLAN AND INTERPRETATION IN THE ALTERNATIVE.

Its first resolution was "that the Articles of Confederation ought to be so revised, corrected and enlarged as to render the federal constitution adequate to the exigencies of government and the preservation of the Union." This was similar to the first resolution of the Virginia plan, "that the Articles of the Confederation ought to be so corrected and enlarged as to accomplish the objects proposed by their institution, namely, common defense, security of liberty and general welfare." The language of both these resolutions appears to have been drawn from the resolution of Congress of February 21, 1787, calling the convention. The Jersey plan in the course of its resolutions proposed, like the Virginia plan and the resolutions of the convention, that the government should thenceforth consist of legislative, executive and judiciary, supreme over the several states.[1] But its legislative was to be composed, not as in the Virginia plan and the resolutions of the convention, but was t main as in the Confederation, consisting of one chamber wherein the several states would be represented equally and members would be chosen by the several legislatures.[2]

[1] Resolutions 2, 4, 5, and 7.

[2] Resolutions 2 and 3. The Jersey plan provided that none of the powers of Congress should be exercised "without consent of at least —— states." It cannot be said how many states the plan would have required to consent to legislation by Congress. According to the Confederation and Union there was required for the exercise of the greater powers of war, etc., the consent of nine states. Jefferson's Works state that the object of this was to insure the consent of the majority of the people of the United States to the exercise of the greater powers of war, etc. It is there said that there are three orders of questions: the first order, as war and peace, alliances, coinage, raising revenue or troops and appointing a commander-in-chief, require the consent of a majority of the people of the Union; the second order require a majority of the states; the third, as adjourning from day to day, require a majority of the members of Congress. Jefferson's Works, vol. 1, p. 398. And on nine states being a majority of the people of the United States, see Madison's Debates in the Convention, July 5th, note.

Its legislative powers were those vested in Congress by the Confederation with an addition of enumerated particular powers, such powers as, when coupled with the powers of Congress by the Confederation, sufficed to equal the particular powers vested in Congress by the Constitution, when it came to be drafted in detail.[1] This will appear later. The resolution for the supremacy of the acts and treaties of the United States over the several states which was adopted by the convention in convention was in the Jersey plan.[2] This plan offered provision also for coercing states or bodies of men therein to obey the acts and treaties of the United States, similar to that which was offered by the Virginia plan, but postponed in committee of the whole after adoption of the express negative on state laws, as observed.[3] It offered the same rule for direct taxes, the rule of the resolutions of April 18, 1783, the whole number of free inhabitants and three-fifths of the slaves.[4] Its proposals for the executive were the same as in the Virginia plan, in respect of what it should consist of and of its powers, except that no negative was offered on state laws,[5] the Jersey plan here reflecting that jealousy of the executive's share in legislation which shows in several state constitutions framed during the Revolution, as a result of the abuses of the crown and crown governors prior thereto;—and removal of the executive was to be on impeachment and conviction by a majority of the executives of the several states, instead of on impeachment and convic-

[1] esolution 2.

[2] Resolution 7.

[3] Resolution 7, par. 2.

[4] Resolution 3. But as representation from the states was to be equal by this plan, it will be observed that representation was not according to the same rule as direct taxation. Thus the plan failed, as the Confederation had failed to observe the principle of the Revolution of representation according to taxation. It appeared in the convention that the first Continental Congress provided for equal representation only because proportionate representation could not be had because the population was not ascertained when the rule was made; but equal representation of the states having been inaugurated it was carried into the Confederation by the same forces which here sought to perpetuate it by means of the Jersey plan.

[5] Resolution 4.

tion alone, as in the resolutions of the convention.[1] Its proposals for the judiciary were similar to the Virginia plan in respect of the supreme tribunal and its composition, save that the appointment of judges was committed to the executive instead of to the second branch of the legislature;[2] and in respect of its jurisdiction this was true so far that the Jersey plan offered all the particular cases of jurisdiction appearing in the Constitution when it came to be drafted in detail, but not its general jurisdiction of all cases arising under laws of the general legislature: moreover the Jersey plan offered no power to establish inferior tribunals.[3] It made proposals for the admission of new states into the Union similar to the Virginia plan, and also for oaths of state officers to support the Union.[4] This was all,—except three resolutions of the Jersey plan, which the Virginia plan did not contain, providing (1) for the hearing of disputes between the United States and individual states respecting territory, (2) for a uniform rule of naturalization, and (3) that offenders in any state not being citizens thereof should be deemed guilty of the same offense as if citizens thereof.[5]

The Virginia plan provided in addition, as observed, for the continuance of Congress pending the introduction of the new government and the completion of their engagements; for amending the Union then and in future; and guaranteeing to each state republican government, etc., as aforesaid. But as far as these were derived from the Confederation they were implied in the Jersey plan, which contemplated the continuance of the Confederation amended.

1 See the recital of this provision of the Jersey plan in Madison's Debates for a different version, that removal of the executive should be by a majority of the executives of the several states, without impeachment.

2 This giving the appointment of judges to the executive indicates the readiness of the Jersey plan to strengthen the executive as was afterwards done in the consideration of the Constitution in detail, only allowing the several states the same voice in the election of the president as in the election of Congress.

3 Resolution 5.

4 Resolutions 8 and 6.

5 Resolutions 9, 10, and 11.

The chief difference apparent between the Virginia and the Jersey plans was in the composition of the legislature, the Jersey plan having but one chamber chosen by the several legislatures with representations from the several states equally, the Virginia plan having two chambers chosen, the first by the people of the several states, the second by the first out of nominations by the several legislatures, representation being according to contributions in both; but this difference was only a means to a much wider difference of the theory of Union as has always been recognized. The Jersey plan denominated the government *federal,* meaning federal as opposed to national, federal in the sense that the government of the United States, its acts and treaties, was supreme over the several states, but only within limits set ultimately by the several states whereof the consequence would be that the United States was dependent upon the several states, and the latter were really and in truth, because ultimately, supreme. In the last analysis the United States would be but the common agent of the several states, having no original power but only derived or delegated authority from the several states.

Such has always been recognized to be the federal theory of government. On June 9, in the convention, Mr. Patterson, who offered the Jersey plan said, as reported in Madison's Debates, that a confederacy supposes sovereignty in the members composing it, and sovereignty supposes equality; if they were to become a nation they must abolish the several states.

By the federal theory the several states would have the rights asserted by the colonies against Great Britain, notwithstanding they had the representation in the Union denied them over there. Accordingly they could not be taxed without their consent, meaning thereby the absolute consent of their several legislatures, instead of consent by representation in the Union, according to the theory of the Union; and this is evidenced in the Jersey plan in its putting taxes to

the front, as the foremost matter here, as against Great Britain, at once after the resolutions to revise the Articles of the Confederation; offering to Congress authority to raise revenue by the identical means which Great Britain employed to tax the colonies without their consent or representation, and which means are recited as grievances against Great Britain in the Declaration of Rights of October 14, 1774, being duties by stamps, and on imports, and by postage, as well as taxes by requisition to the colonies severally; and coupling this authority with the further authority offered, and with prohibition against still further authority, both of which Great Britain employed as means to the same end, and which are recited in the Declaration of Rights aforesaid. Thus power to regulate commerce external to the several states,—that is, among the several states and with foreign nations—which was conceded to Great Britain when exercised in good faith and not for revenue, was employed to raise revenue—the duty on tea being called but a regulation of commerce—and recited among the grievances in the Declaration of Rights, as in many other papers and addresses of the Continental Congress; which Declaration also recites the act of Parliament for prosecuting offenses for the recovery of penalties and forfeitures for non-payment of taxes imposed, in the courts of vice-admiralty, as means whereby jurisdiction of the king's courts was unconstitutionally extended beyond their ancient limits, and subjects were no longer judged in the courts of the colonies, proceeding according to the course of common law, with the right of jury trial; but, as the language runs, subjects were "reduced to the sad necessity of being judged by a single man, a creature of the crown."[1]

By the Jersey plan the federal theory would be maintained by the several legislatures as equals, choosing members of the federal Congress who should

[1] See for a modern instance of this question, *In re* Debs, decided by the United States Supreme Court in 1895.

be dependent on and represent the several states over the United States. *But this state supremacy, it will be observed, might be maintained in the Virginia plan as well as in the Jersey plan, provided one only of the two branches of the legislature should be composed as in the Jersey plan, because the branch so composed might always negative legislation of the other inimical to that plan, since by the theory of the two branches each was to have a negative on the other.* And this composition of the legislature being the chief difference between the two plans, the concession in the resolutions of the convention in convention of one branch composed according to the Jersey plan, coupled with the unanimous omission of the word "national" from the resolutions of the convention in convention, sufficed to remove the chief objection of the adherents of the Jersey plan to the resolutions of the convention, and to bring the entire convention, majority and minority, Virginia plan, committee of the whole, convention in convention, and Jersey plan all into very general agreement. The difference left open was a difference of interpretation and construction. The government might be construed to the federal plan or to the national plan.

Thus, when, on July 26, the resolutions of the convention in convention were referred to a committee of detail to draft a constitution conformable to those resolutions they presented a constitution in mass or in block, which may be summed up as follows, with the precedents of the several resolutions, by whom they were agreed to in the convention, and how interpreted.

The government of the United States was to consist of a legislative, judiciary and executive, derived from the constitutions of the several states and of Great Britain—the former constitutions being derived from the latter by way of the several colonies; and this was agreed to in all four sets of resolutions, the Virginia plan, the report from committee of the

whole twice, the Jersey plan, and the resolutions of the convention in convention. The government was to be supreme ; this was agreed to by all without exception as aforesaid, though interpreted differently. The legislature should have two branches, according to the constitutions aforesaid; this was agreed to by all but the Jersey plan, which offered a legislative of but one chamber, according to the Confederation; yet with one chamber at command the several states could negative legislation of the other, and withhold the supremacy of the United States. The first branch should be elected by the people of the constituent bodies of the Union, according to the constitutions; this was agreed to by all but the Jersey plan, proposing the choice by the several legislatures as in the Confederation. The second branch should be chosen by the several legislatures, according to the Confederation, and agreed to by all but the Virginia plan. Legislative power should be that vested in Congress by the Confederation, agreed to by all; and in all cases for the general interests of the Union—inserted by the convention in convention from the purposes of Congress by the Confederation—and where the states should be separately incompetent or individual legislation would interrupt the harmony of the Union; which was according to the principle of self-government, general and local, of the constitutions, and agreed to by all but the Jersey plan; which offered several particular powers only, yet all the particular powers of Congress by the Constitution when it came to be drafted in detail. Legislative power to negative state laws was agreed to by all, though in the Virginia plan and committee of the whole the negative was express and direct, according to the British executive's negative over the colonies, while in the Jersey plan and the convention in convention it was implied and indirect, according to the Confederation. Representation in the first branch should be according to direct taxation, which should

be according to the whole number of free inhabitants of the several states and three-fifths of their slaves; this was agreed to by all but the Jersey plan, it may be submitted, though in the Virginia plan expressed otherwise, and in committee of the whole not expressed in part, but implied by the expression of the rule which was the rule of direct taxation; the principle of representation according to direct taxation being from the constitutions and the rule of numbers from the Confederation; the Jersey plan having offered representation and direct taxation as in the Confederation, where they were not according to each other. Representation in the second branch should be equal from the several states as in the Confederation, which was agreed to by the convention in convention and the Jersey plan, the committee of the whole and the Virginia plan having agreed on representation in the second branch as in the first branch. But in consideration of the several states retaining representation as equals in the second branch they lost the initiative in bills for revenue, and by the compromise all bills for revenue should originate in the first branch and not be altered or amended by the second, which was according to the British constitution.

The executive should be a single person chosen by the legislature for seven years, with fixed compensation and ineligible a second time, but removable by impeachment; with general power to execute the general laws and authority to appoint to offices ; all according to the constitutions, yet developed from the Confederation; and agreed to by all, save that the Virginia plan and the Jersey plan did not confine the executive to a single person or fix the duration of office. Moreover, the executive should have a negative on all laws of the general legislature not again passed over him by two-thirds of each branch, which was nearly according to the constitution of New York, the latest among the state constitutions;[1] and was

[1] The British executive's absolute negative not having been exercised for one hundred years.

agreed to by the committee of the whole and the convention in convention, the Virginia plan giving the negative to the executive with a council of the judiciary, and the Jersey plan, according to the early state constitutions, having offered no negative at all.

The judiciary should consist of a supreme tribunal chosen by the second branch of the legislature, with provision for its independency; and jurisdiction extending to cases arising under laws of the general legislature; and inferior tribunals were authorized to be appointed by both branches of the legislature. This was pursuant to the constitutions, yet developed from the Confederation, and was agreed to by all save that the Virginia plan did not provide who should appoint the judiciary, and the Jersey plan would have given that appointing power to the executive. Moreover, the Jersey plan offered no inferior tribunals, and confined the jurisdiction to particular and enumerated cases; yet offering all the particular cases contained in the Constitution when it came to be drafted in detail.

Provision for admission of new states arising within the limits of the United States was from the Confederation and was agreed to by all, the Jersey plan providing in terms for the admission of new states "into the Union," and the Union implying its limits. Guaranty to each state of republican government and against violence was developed from the Confederation, and so agreed to in different forms by all but the Jersey plan, which left the guaranty as in the Confederation. Oaths of state and national officers to support the articles of Union were according to the constitutions, and were agreed to by all, save that the Virginia and the Jersey plans had not included national officers in the oath. Provisions for the continuance of Congress and the completion of their engagements; for amending the Union in future, and ratifying the present amendments, were derived from the Confederation, and agreed to by all,

except that the Jersey plan made no further provision on these matters, contemplating the continuance of the present government with amendments.

Presenting itself thus, the instrument was open to widely different interpretation. By the Virginia plan, the resolutions of the convention in committee of the whole and in convention, that is by the national plan, the resolution that the government was to be supreme meant conclusively supreme over the several states; while by the Jersey plan, the federal plan, it appears to have meant supremacy within limits set ultimately by the several states, whereby the latter would be ultimately supreme over the former; and freedom of interpretation either way was permitted by the unanimous omission of the word "national" from the resolution of the convention in convention. By the national plan this supremacy was a positive supremacy to be maintained over the several states; for the federal plan it was rather negative, the withholding the supremacy of the United States. Only by the concurrence of both branches of the legislature could national supremacy be maintained, since both branches must concur to pass laws; while federal supremacy could be maintained by only one branch, since either branch might negative legislation of the other. The legislature was the theatre for the determination of supremacy. The second branch being the one composed according to the federal plan would be deemed to represent the several states, and the first branch composed according to the national plan would be deemed to represent the United States.[1] As the second branch should prevail, legislation would represent the several states and the government be construed to the federal plan, while as the first branch prevailed, the government would be construed to the national plan, and legislation would represent the United States. In the latter event it may be observed the status of the several states in the second branch

[1] This appears in fact in the speeches of the period of Webster and Calhoun.

would correspond to that of the constituent bodies, the counties and towns of England and the several states in the upper branches of their legislatures, for therein their constituent bodies retained ancient privileges, notwithstanding their disparity as parts of the whole, being represented in several cases as equals, with choice of members by the upper classes, rather than by the people: so by the national plan the several states would retain ancient privileges in the second branch of the legislature, according to the constituent bodies in the precedent constitutions,—which latter bodies were also, one time, perhaps, independent and equal before they were united.

Another difference of interpretation was that as the national plan prevailed, legislative power would be one general power in all cases for the general interests of the Union, and where the separate states should be incompetent or their legislation would interrupt the harmony of the whole; that is power according to the purposes of Congress by the Confederation, and according to the constitutional precedents; the power of perfect union; while as the federal plan prevailed the legislature would have only several particular powers, remaining for further authority, as the same should be required from time to time, or from period to period, dependent on the several states. By the national plan the legislature would be independent once for all, and adequate to perfect union.

As the national plan prevailed, the negative on the several states would be exercised; as the federal plan prevailed, its exercise would be withheld. In either case coercion by force of arms of the several states or any body of men acting by their authority would be avoided; but only with the consequences in the alternative, of the supremacy of the United States or of the several states.

By the national plan direct taxes would be taxes apportioned direct to the several states, instead of extending throughout them all united, which would

be indirect taxation to the several states; and the national legislature might administer the quotas directly to the inhabitants thereof. By the federal plan direct taxes would be voluntary contributions from the several states, which Congress might only direct collection of in non-complying states, and pass acts directing the same.

By the national plan the limits of the United States would appear to be the bounds of America; but by the federal plan they would be restricted to the several states ultimately; for otherwise to which of the several states would territory beyond the bounds of the several states ultimately belong?[1]

But by the two plans this identity would appear, that interpretation or construction belonged to the legislative, rather than to the judiciary or executive, as is witnessed by the direct negative of the Virginia plan and the committee of the whole being by the national legislature whenever state laws should contravene the articles and treaties of Union *in their opinion;* and by the indirect negative of the Jersey plan and the resolution of Congress wherefrom the resolution of the convention in convention was drawn, being by Congress on the ground that *in their opinion* state laws contradicted and were repugnant to the constitutional acts and treaties of Union. Moreover, the essence of the controversy and the compromise between the national and federal plans going to the composition of the legislative would appear to assume it to be the medium and theatre for control of the government, to construe it to the supremacy of the United States or of the several states; to interpret the power of Congress as one general power or as many particular powers; to exercise the negative on the several states or to withhold it.

[1] This question was, as a matter of fact, a great incentive to Union sentiment in the case of the old Northwest Territory.

PART II.

THE PURPOSE.

Here, for the second part hereof, will be set out from the Journal the papers which were under consideration by the convention subsequent to August 6th, when the committee of detail to whom were referred the proceedings of the convention, with the Pinckney draft and the Jersey plan, with instructions to report a constitution conformable to those proceedings, made their report. These papers are the first or rough draft of the Constitution reported from the committee of detail August 6th, the Pinckney draft,—the Jersey plan being here again referred to; the revised and arranged draft of the constitution reported from the committee of revision September 12th; and the constitution complete as signed September 17th.

These will be gone over article by article, section by section, to observe the precedents of the rough draft beyond those already noted, and how it conforms to the resolutions of the convention, and yet is interpretable to the Jersey plan; then to observe the changes in the draft prior to September 12th, noting additions made with their precedents, and also omissions; and lastly the final changes between September 12th and September 17th. The Articles of Confederation and Perpetual Union are here again referred to; and it will be borne in mind that to the committee of detail were referred the Pinckney draft and the Jersey plan, along with the proceedings of the convention.

THE PINCKNEY DRAFT.

[Paper furnished by Mr. Pinckney.]

"We, the people of the states of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, do ordain, declare, and establish, the following constitution, for the government of ourselves and posterity.

"ARTICLE I.—The style of this government shall be, The United States of America, and the government shall consist of supreme legislative, executive, and judicial powers.

"ART. II.—The legislative power shall be vested in a Congress, to consist of two separate Houses; one to be called the House of Delegates, and the other the Senate, who shall meet on the day of in every year.

"ART. III.—The members of the House of Delegates shall be chosen every year by the people of the several states; and the qualifications of the electors shall be the same as those of the electors in the several states for their legislatures. Each member shall have been a citizen of the United States for years; and shall be of years of age, and a resident in the state he is chosen for. Until a census of the people shall be taken, in the manner hereinafter mentioned, the House of Delegates shall consist of , to be chosen from the different states in the following proportions; for New Hampshire, ; for Massachusetts, ; for Rhode Island, ; for Connecticut, ; for New York, ; for New Jersey, ; for Pennsylvania, ; for Delaware, ; for Maryland, ; for Virginia, ; for North Carolina, ; for South Carolina, ; for Georgia, ; and the legislature shall hereinafter regulate the number of delegates by the number of inhabitants, according to the provisions hereinafter made, at the rate of one for every thousand. All money bills of every kind shall originate in the House of Delegates, and shall not be altered by the Senate. The House of Delegates shall exclusively possess the power of impeachment, and shall choose its own officers; and vacancies therein shall be supplied by the executive authority of the state in the representation from which they shall happen.

"ART. IV.—The Senate shall be elected and chosen by the House of Delegates; which House, immediately after their meeting, shall choose by ballot senators from among

the citizens and residents of New Hampshire; from among those of Massachusetts; from among those of Rhode Island; from among those of Connecticut; from among those of New York; from among those of New Jersey; from among those of Pennsylvania; from among those of Delaware; from among those of Maryland; from among those of Virginia; from among those of North Carolina; from among those of South Carolina; and from among those of Georgia. The senators chosen from New Hampshire, Massachusetts, Rhode Island, and Connecticut shall form one class; those from New York, New Jersey, Pennsylvania, and Delaware, one class; and those from Maryland, Virginia, North Carolina, South Carolina, and Georgia, one class. The House of Delegates shall number these classes, one, two, and three; and fix the times of their service by lot. The first class shall serve for years; the second for years; the third for years. As their times of service expire, the House of Delegates shall fill them up by elections for years; and they shall fill all vacancies that arise from death or resignation, for the time of service remaining of the members so dying or resigning. Each senator shall be years of age at least; and shall have been a citizen of the United States for four years before his election; and shall be a resident of the state he is chosen from. The Senate shall choose its own officers.

"ART. V.—Each state shall prescribe the time and manner of holding elections by the people for the House of Delegates; and the House of Delegates shall be the judges of the elections, returns, and qualifications of their members. In each House, a majority shall constitute a quorum to do business. Freedom of speech and debate in the legislature shall not be impeached, or questioned, in any place out of it; and the members of both houses shall, in all cases, except for treason, felony, or breach of the peace, be free from arrest during their attendance on Congress, and in going to and returning from it. Both Houses shall keep Journals of their proceedings, and publish them, except on secret occasions; and the yeas and nays may be entered thereon at the desire of one of the members present. Neither House, without the consent of the other, shall adjourn for more than days nor to any place but where they are sitting.

"The members of each House shall not be eligible to, or capable of holding, any office under the Union, during the time for which they have been respectively elected; nor the members of the Senate for one year after. The members of

each House shall be paid for their services by the states which they represent. Every bill which shall have passed the legislature shall be presented to the President of the United States for his revision; if he approves it, he shall sign it; but if he does not approve it, he shall return it, with his objections, to the House it originated in; which house, if two-thirds of the members present, notwithstanding the President's objections, agree to pass it, shall send it to the other House, with the President's objections, where if two-thirds of the members present also agree to pass it, the same shall become a law; and all bills sent to the President, and not returned by him within days, shall be laws, unless the legislature, by their adjournment, prevent their return; in which case they shall not be laws.

"ART. VI.—The legislature of the United States shall have the power to lay and collect taxes, duties, imposts, and excises;

"To regulate commerce with all nations, and among the several states;

"To borrow money, and emit bills of credit;

"To establish post-offices;

"To raise armies;

"To build and equip fleets;

"To pass laws for arming, organizing and disciplining the militia of the United States;

"To subdue a rebellion in any state, on application of its legislature;

"To coin money, and regulate the value of all coins, and fix the standard of weights and measures;

"To provide such dockyards and arsenals, and erect such fortifications, as may be necessary for the United States, and to exercise exclusive jurisdiction therein;

"To appoint a treasurer by ballot;

"To constitute tribunals inferior to the supreme court;

"To establish post and military roads;

"To establish and provide for a national university at the seat of government of the United States;

"To establish uniform rules of naturalization;

"To provide for the establishment of a seat of government for the United States, not exceeding miles square, in which they shall have exclusive jurisdiction;

"To make rules concerning captures from an enemy;

"To declare the law and punishment of piracies and felonies at sea, and of counterfeiting coin, and of all offences against the laws of nations;

" To call forth the aid of the militia to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions;

" And to make all laws for carrying the foregoing powers into execution.

" The legislature of the United States shall have the power to declare the punishment of treason, which shall consist only in levying war against the United States, or any of them, or in adhering to their enemies. No person shall be convicted of treason but by the testimony of two witnesses.

" The proportion of direct taxation shall be regulated by the whole number of inhabitants of every description; which number shall, within years after the first meeting of the legislature, and within the term of every year after, be taken in the manner to be prescribed by the legislature.

" No tax shall be laid on articles exported from the states; nor capitation tax, but in proportion to the census before directed.

" All laws regulating commerce shall require the assent of two thirds of the members present in each house. The United States shall not grant any title of nobility. The legislature of the United States shall pass no law on the subject of religion; nor touching or abridging the liberty of the press, nor shall the privilege of the writ of habeas corpus ever be suspended, except in cases of rebellion or invasion.

" All acts made by the legislature of the United States, pursuant to this Constitution, and all treaties made under the authority of the United States, shall be the supreme law of the land; and all judges shall be bound to consider them as such in their decisions.

" Art. VII.—The Senate shall have the sole and exclusive power to declare war, and to make treaties, and to appoint ambassadors and other ministers to foreign nations, and judges of the supreme court.

" They shall have the exclusive power to regulate the manner of deciding all disputes and controversies now subsisting, or which may arise, between the states, respecting jurisdiction or territory.

" Art. VIII.—The executive power of the United States shall be vested in a President of the United States of America, which shall be his style; and his title shall be His Excellency. He shall be elected for years; and shall be re-eligible.

" He shall from time to time give information to the legislature of the state of the Union, and recommend to their consideration the measures he may think necessary. He shall

take care that the laws of the United States be duly executed. He shall commission all the officers of the United States; and, except as to ambassadors, other ministers, and judges of the supreme court, he shall nominate, and, with the consent of the Senate, appoint, all other officers of the United States. He shall receive public ministers from foreign nations; and may correspond with the executives of the different states. He shall have power to grant pardons and reprieves, except in impeachments. He shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states; and shall receive a compensation which shall not be increased or diminished during his continuance in office. At entering on the duties of his office, he shall take an oath faithfully to execute the duties of a President of the United States. He shall be removed from his office on impeachment by the House of Delegates, and conviction, in the supreme court, of treason, bribery, or corruption. In case of his removal, death, resignation, or disability, the president of the Senate shall exercise the duties of his office until another President be chosen. And in case of the death of the president of the Senate, the speaker of the House of Delegates shall do so.

"ART. IX.—The legislature of the United States shall have the power, and it shall be their duty, to establish such courts of law, equity, and admiralty, as shall be necessary.

"The judges of the courts shall hold their offices during good behavior; and receive a compensation, which shall not be increased or diminished during their continuance in office. One of these courts shall be termed the supreme court; whose jurisdiction shall extend to all cases arising under the laws of the United States, or affecting ambassadors, other public ministers and consuls; to the trial of impeachment of officers of the United States; to all cases of admiralty and maritime jurisdiction. In cases of impeachment affecting ambassadors, and other public ministers, this jurisdiction shall be original; and in all other cases appellate.

"All criminal offences, except in cases of impeachment, shall be tried in the state where they shall be committed. The trials shall be open and public, and be by jury.

"ART. X—Immediately after the first census of the people of the United States, the House of Delegates shall apportion the Senate by electing for each state, out of the citizens resident therein, one senator for every members each state shall have in the House of Delegates. Each state shall be entitled to have at least one member in the Senate.

"ART. XI.—No state shall grant letters of marque and reprisal, or enter into treaty, or alliance, or confederation; nor

grant any title of nobility; nor, without the consent of the legislature of the United States, lay any impost on imports; nor keep troops or ships of war in time of peace; nor enter into compacts with other states or foreign powers, or emit bills of credit, or make anything but gold, silver, or copper, a tender in payment of debts; nor engage in war, except for self-defence when actually invaded, or the danger of invasion is so great as not to admit of a delay until the government of the United States can be informed thereof. And, to render these prohibitions effectual, the legislature of the United States shall have the power to revise the laws of the several states that may be supposed to infringe the powers exclusively delegated by this Constitution to Congress, and to negative and annul such as do.

"ART. XII.—The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. Any person, charged with crimes in any state, fleeing from justice to another, shall, on demand of the executive of the state from which he fled, be delivered up, and removed to the state having jurisdiction of the offence.

"ART. XIII.—Full faith shall be given, in each state, to the acts of the legislature, and to the records and judicial proceedings of the courts and magistrates of every state.

"ART. XIV.—The legislature shall have power to admit states into the Union, on the same terms with the original states; provided two-thirds of the members present in both houses agree.

"ART. XV.—On the application of the legislature of a state, the United States shall protect it against domestic insurrection.

"ART. XVI.—If two thirds of the legislatures of the states apply for the same, the legislature of the United States shall call a convention for the purpose of amending the Constitution; or, should Congress, with the consent of two-thirds of each house, propose to the states amendments to the same, the agreement of two-thirds of the legislatures of the states shall be sufficient to make the said amendments parts of the Constitution.

"The ratification of the conventions of states shall be sufficient for organizing this Constitution.

DRAFT OF A CONSTITUTION.

REPORTED BY THE COMMITTEE OF FIVE, AUGUST 6, 1787.

[One copy of this printed draft is among the papers deposited by President Washington in the Department of State; another copy is among the papers of Mr. Brearly, furnished by General Bloomfield.]

"We, the people of the states of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, do ordain, declare and establish the following Constitution for the government of ourselves and our posterity:—

"ARTICLE I.—The style of this government shall be, 'The United States of America.'

"ART. II.—The government shall consist of supreme legislative, executive, and judicial powers.

"ART. III.—The legislative power shall be vested in a Congress, to consist of two separate and distinct bodies of men, a House of Representatives and a Senate; each of which shall in all cases have a negative on the other. The legislature shall meet on the first Monday in December every year.

"ART. IV.—SECT. 1. The members of the House of Representatives shall be chosen every second year, by the people of the several states comprehended within the Union. The qualifications of the electors shall be the same from time to time, as those of the electors, in the several states, of the most numerous branch of their own legislatures.

"SECT. 2. Every member of the House of Representatives shall be of the age of twenty-five years at least; shall have been a citizen in the United States for at least three years before his election; and shall be, at the time of his election, a resident of the state in which he shall be chosen.

"SECT. 3. The House of Representatives shall, at its first formation, and until the number of citizens and inhabitants shall be taken in the manner hereinafter described, consist of sixty-five members, of whom three shall be chosen in New Hampshire, eight in Massachusetts, one in Rhode Island and Providence Plantations, five in Connecticut, six in New York, four in New Jersey, eight in Pennsylvania, one in Delaware, six in Maryland, ten in Virginia, five in North Carolina, five in South Carolina and three in Georgia.

"SECT. 4. As the proportions of numbers in different states will alter from time to time; as some of the states may hereafter be divided; as others may be enlarged by addition of territory; as two or more states may be united; as new

states will be erected within the limits of the United States,—the legislature shall, in each of these cases, regulate the number of representatives by the number of inhabitants, according to the provisions hereinafter made, at the rate of one for every forty thousand.

"SECT. 5. All bills for raising or appropriating money, and for fixing the salaries of the officers of government, shall originate in the House of Representatives, and shall not be altered or amended by the Senate. No money shall be drawn from the public treasury, but in pursuance of appropriations that shall originate in the House of Representatives.

"SECT. 6. The House of Representatives shall have the sole power of impeachment. It shall choose its speaker and other officers.

"SECT. 7. Vacancies in the House of Representatives shall be supplied by writs of election from the executive authority of the states in the representation from which they shall happen.

"ART. V.—SECT. 1. The Senate of the United States shall be chosen by the legislatures of the several states. Each legislature shall choose two members. Vacancies may be supplied by the executive until the next meeting of the legislature. Each member shall have one vote.

"SECT. 2. The senators shall be chosen for six years; but immediately after the first election, they shall be divided, by lot, into three classes, as nearly as may be, numbered one, two, and three. The seats of the members of the first class shall be vacated at the expiration of the second year; of the second class at the expiration of the fourth year; of the third class at the expiration of the sixth year; so that a third part of the members may be chosen every second year.

"SECT. 3. Every member of the Senate shall be of the age of thirty years at least; shall have been a citizen of the United States for at least four years before his election, and shall be, at the time of his election, a resident of the state for which he shall be chosen.

"SECT. 4. The Senate shall choose its own president and other officers.

"ART. VI.—SECT. 1. The times, and places, and manner, of holding the elections of the members of each House, shall be prescribed by the legislature of each state; but their own provisions concerning them may, at any time, be altered by the legislature of the United States.

"SECT. 2. The legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said legislature shall seem expedient.

" SECT. 3. In each House a majority of the members shall constitute a quorum to do business; but a smaller number may adjourn from day to day.

" SECT. 4. Each House shall be the judge of the elections, returns, and qualifications, of its own members.

" SECT. 5. Freedom of speech and debate in the legislature shall not be impeached or questioned in any court or place out of the legislature; and the members of each House shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at Congress, and in going to and returning from it.

" SECT. 6. Each House may determine the rules of its proceedings; may punish its members for disorderly behavior; and may expel a member.

" SECT. 7. The House of Representatives and the Senate when it shall be acting in a legislative capacity, shall keep a journal of their proceedings; and shall, from time to time, publish them; and the yeas and nays of the members of each House, on any question, shall, at the desire of one-fifth part of the members present, be entered on the Journal.

" SECT. 8. Neither House, without the consent of the other, shall adjourn for more than three days, nor to any other place than that at which the two Houses are sitting. But this regulation shall not extend to the Senate when it shall exercise the powers mentioned in the —— Article.

" SECT. 9. The members of each House shall be ineligible to, and incapable of holding, any office under the authority of the United States, during the time for which they shall respectively be elected; and the members of the Senate shall be ineligible to, and incapable of holding, any such office for one year afterwards.

" SECT. 10. The members of each House shall receive a compensation for their services, to be ascertained and paid by the state in which they shall be chosen.

" SECT. 11. The enacting style of the laws of the United State shall be, 'Be it enacted, and it is hereby enacted, by the House of Representatives, and by the Senate, of the United States, in Congress assembled.'

" SECT. 12. Each House shall possess the right of originating bills, except in the cases before mentioned.

" SECT. 13. Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States for his revision. If, upon such revision, he approve of it, he shall signify his approbation by signing it. But if, upon such revision, it shall appear to him improper for being passed into

a law, he shall return it, together with his objections against it, to that House in which it shall have originated; who shall enter the objections at large on their Journal, and proceed to reconsider the bill. But if, after such reconsideration, two-thirds of that House shall, notwithstanding the objections of the President, agree to pass it, it shall, together with his objections, be sent to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of the other House also, it shall become a law. But, in all such cases the votes of both Houses shall be determined by yeas and nays; and the names of the persons voting for or against the bill shall be entered in the Journal of each House respectively. If any bill shall not be returned by the President within seven days, after it shall have been presented to him, it shall be a law, unless the legislature, by their adjournment, prevent its return, in which case it shall not be a law.

"ART. VII.—SECT. 1. The legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises;

"To regulate commerce with foreign nations, and among the several states;

"To establish a uniform rule of naturalization throughout the United States;

"To coin money;

"To regulate the value of foreign coin;

"To fix the standard of weights and measures;

"To establish post-offices;

"To borrow money, and emit bills, on the credit of the United States;

"To appoint a treasurer by ballot;

"To constitute tribunals inferior to the supreme court;

"To make rules concerning captures on land and water;

"To declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations;

"To subdue a rebellion in any state, on the application of its legislature;

"To make war;

"To raise armies;

"To build and equip fleets;

"To call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions; and

"To make all laws that shall be necessary and proper for carrying into execution the foregoing powers, and all other

powers vested by this Constitution in the government of the United States, or in any department or office thereof.

"SECT. 2. Treason against the United States shall consist only in levying war against the United States, or any of them; and in adhering to the enemies of the United States, or any of them. The legislature of the United States shall have power to declare the punishment of treason. No person shall be convicted of treason, unless on the testimony of two witnesses. No attainder of treason shall work corruption of blood, nor forfeiture, except during the life of the person attainted.

"SECT. 3. The proportions of direct taxation shall be regulated by the whole number of white and other free citizens and inhabitants of every age, sex, and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, (except Indians not paying taxes;) which number shall, within six years after the first meeting of the legislature, and within the term of every ten years afterwards, be taken in such manner as the said legislature shall direct.

"SECT. 4. No tax or duty shall be laid by the legislature on articles exported from any state; nor on the migration or importation of such persons as the several states shall think proper to admit; nor shall such migration or importation be prohibited.

"SECT. 5. No capitation tax shall be laid, unless in proportion to the census hereinbefore directed to be taken.

"SECT. 6. No navigation act shall be passed without the assent of two-thirds of the members present in each House.

"SECT. 7. The United States shall not grant any title of nobility.

"ART. VIII.—The acts of the legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States, shall be the supreme law of the several states, and of their citizens and inhabitants; and the judges in the several states shall be bound thereby in their decisions, any thing in the constitutions or laws of the several states to the contrary notwithstanding.

"ART. IX.—SECT. 1. The Senate of the United States shall have power to make treaties, and appoint ambassadors, and judges of the supreme court.

"SECT. 2. In all disputes and controversies now subsisting, or that may hereafter subsist, between two or more states, respecting jurisdiction or territory, the Senate shall possess the following powers:—Whenever the legislature or executive authority, or lawful agent of any state, in controversy with another, shall by memorial to the Senate, state the

matter in question, and apply for a hearing, notice of such memorial and application shall be given, by order of the Senate, to the legislature, or the executive authority, of the other state in controversy. The Senate shall assign a day for the appearance of the parties, by their agents, before that House. The agents shall be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question. But if the agents cannot agree, the Senate shall name three persons out of each of the several states; and from the list of such persons, each party shall alternately strike out one, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine, names, as the Senate shall direct, shall, in their presence, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges to hear and finally determine the controversy; provided a majority of the judges who shall hear the cause agree in the determination. If either party shall neglect to attend at the day assigned, without showing sufficient reasons for not attending, or being present shall refuse to strike, the Senate shall proceed to nominate three persons out of each state, and the Clerk of the Senate shall strike in behalf of the party absent, or refusing. If any of the parties shall refuse to submit to the authority of such court, or shall not appear to prosecute or defend their claim or cause, the court shall nevertheless proceed to pronounce judgment. The judgment shall be final and conclusive. The proceedings shall be transmitted to the President of the Senate, and shall be lodged among the public records, for the security of the parties concerned. Every commissioner shall, before he sit in judgment, take an oath, to be administered by one of the judges of the supreme or superior court of the state where the cause shall be tried, 'well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection or hope of reward.

"SECT. 3. All controversies concerning lands claimed under different grants of two or more states, whose jurisdictions, as they respect such lands, shall have been decided or adjusted subsequent to such grants, or any of them, shall, on application to the Senate, be finally determined, as near as may be, in the same manner as is before prescribed for deciding controversies between different states.

"ART. X.—SECT. 1. The executive power of the United States shall be vested in a single person. His style shall be, 'The President of the United States of America,' and his title shall be, 'His Excellency.' He shall be elected by bal-

lot by the legislature. He shall hold his office during the term of seven years; but shall not be elected a second time.

"SECT. 2. He shall, from time to time, give information to the legislature of the state of the Union. He may recommend to their consideration such measures as he shall judge necessary and expedient. He may convene them on extraordinary occasions. In cases of disagreement between the two Houses, with regard to the time of adjournment, he may adjourn them to such time as he thinks proper. He shall take care that the laws of the United States be duly and faithfullv executed. He shall commission all the officers of the United States; and shall appoint officers in all cases not otherwise provided for by this Constitution. He shall receive ambassadors, and may correspond with the supreme executives of the several states. He shall have power to grant reprieves and pardons, but his pardon shall not be pleadable in bar of an impeachment. He shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states. He shall, at stated times, receive for his services a compensation, which shall be neither increased nor diminished during his continuance in office. Before he shall enter on the duties of his department, he shall take the following oath or affirmation: 'I solemnly swear (or affirm) that I will faithfully execute the office of President of the United States of America.' He shall be removed from his office on impeachment by the House of Representatives, and conviction, in the supreme court, of treason, bribery, or corruption. In case of his removal, as aforesaid, death, resignation, or disability to discharge the powers and duties of his office, the President of the Senate shall exercise those powers and duties until another President of the United States be chosen, or until the disability of the President be removed.

"ART. XI.—SECT. 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as shall, when necessary, from time to time, be constituted by the legislature of the United States.

"SECT. 2. The judges of the supreme court, and of the inferior courts, shall hold their offices during good behavior. They shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

"SECT. 3. The jurisdiction of the supreme court shall extend to all cases arising under laws passed by the legislature of the United States; to all cases affecting ambassadors, other public ministers and consuls; to the trial of impeachments of officers of the United States; to all cases of admiralty and maritime jurisdiction; to controversies between two or more

states, (except such as shall regard territory or jurisdiction;) between a state and citizens of another state; between citizens of different states; and between a state, or the citizens thereof, and foreign states, citizens, or subjects. In cases of impeachment, cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, this jurisdiction shall be original. In all other cases before mentioned, it shall be appellate, with such exceptions, and under such regulations, as the legislature shall make. The legislature may assign any part of the jurisdiction above mentioned, (except the trial of the President of the United States,) in the manner and under the limitations which it shall think proper, to such inferior courts as it shall constitute from time to time.

"SECT. 4. The trial of all criminal offences (except in cases of impeachment) shall be in the state where they shall be committed; and shall be by jury.

"SECT. 5. Judgment, in cases of impeachment, shall not extend farther than removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit, under the United States. But the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law.

"ART. XII.—No state shall coin money; nor grant letters of marque and reprisal: nor enter into any treaty, alliance, or confederation: nor grant any title of nobility.

"ART. XIII.—No state, without the consent of the legislature of the United States, shall emit bills of credit, or make anything but specie a tender in payment of debts; nor lay imposts or duties on imports; nor keep troops or ships of war in time of peace; nor enter into any agreement or compact with another state, or with any foreign power; nor engage in any war, unless it shall be actually invaded by enemies, or the danger of invasion be so imminent as not to admit of a delay until the legislature of the United States can be consulted.

"ART. XIV.—The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

"ART. XV.—Any person charged with treason, felony, or high misdemeanor in any state who shall flee from justice, and shall be found in any other state, shall, on demand of the executive power of the state from which he fled, be delivered up and removed to the state having jurisdiction of the offence.

"ART. XVI.—Full faith shall be given in each state to the acts of the legislatures, and to the records and judicial proceedings of the courts and magistrates of every other state.

"ART. XVII.—New states lawfully constituted or established within the limits of the United States may be admitted, by the legislature, into this government; but to such admission the consent of two-thirds of the members present in each House shall be necessary. If a new state shall arise within the limits of any of the present states, the consent of the legislatures of such states shall also be necessary to its admission. If the admission be consented to, the new states shall be admitted on the same terms with the original states. But the legislature may make conditions with the new states concerning the public debt which shall then be subsisting.

"ART. XVIII.—The United States shall guaranty to each state a republican form of government; and shall protect each state against foreign invasions, and, on the application of its legislature, against domestic violence.

"ART. XIX.—On the application of the legislature of two-thirds of the states in the Union, for an amendment of this Constitution, the legislature of the United States shall call a convention for that purpose.

"ART. XX.—The members of the legislatures, and the executive and judicial officers of the United States, and of the several states, shall be bound by oath to support this Constitution.

"ART. XXI.—The ratification of the conventions of —— states shall be sufficient for organizing this Constitution.

"ART. XXII.—This Constitution shall be laid before the United States in Congress assembled, for their approbation; and it is the opinion of this Convention, that it should be afterwards submitted to a convention chosen in each state, under the recommendation of its legislature, in order to receive the ratification of such convention.

"ART. XXIII.—To introduce this government, it is the opinion of this Convention, that each assenting convention should notify its assent and ratification to the United States in Congress assembled; that Congress, after receiving the assent and ratification of the conventions of —— states, should appoint and publish a day, as early as may be, and appoint a place, for commencing proceedings under this Constitution; that, after such publication, the legislatures of the several states should elect members of the Senate and direct the election of members of the House of Representatives; and that the members of the legislature should meet at the time and place assigned by Congress, and should, as soon as may be after their meeting, choose the President of the United States, and proceed to execute this Constitution.

THE CONSTITUTION IN DETAIL.

CONSIDERATION OF THE ROUGH DRAFT.

The preamble of the rough draft is the preamble of the Pinckney draft, and is like the preamble of the Confederation, except that the people of the states are named instead of the states as the constituting power.

Article I of the rough draft, that the style of the government shall be the United States of America, is in the Pinckney draft, Article I, and is furthermore from the Confederation, Article I. Article II of the rough draft that the government consist of supreme legislative, executive and judiciary appears in Pinckney draft, Article I, conforming to the first resolution of the convention in convention. Article III of the rough draft, that legislative power be vested in Congress of two bodies, the house of representatives and the senate, each having a negative on the other, and meeting on the first Monday in every December, is the Pinckney draft, Article II, conforming to the 2nd resolution of the convention in convention, and also derived from the Confederation and the several states; the legislature of the Confederation being entitled "Congress," the title "House of Representatives" best characterizing the popular branch of Congress and being the name thereof in several states, and "Senate" being the name of the upper branch in most of the states. By the Confederation, Article V, Congress assembled on the first Monday of, not December, but November. By the theory of the two branches each had the right of negative on the other, which right was the ground of alternative interpretation as observed.

Article IV, sections 1, 2, 3, 4, 5, and 6, that representatives be chosen by the people of the several states every two years, with qualifications of electors, qualifications of representatives, the number of members at first and how regulated in future; and respecting bills for revenue; and that the house of representatives have sole power of impeachment and choose its speaker and other officers; and that vacancies be supplied by the executives of the respective states is all Pinckney draft, Article III, conforming to the 3d resolution of the convention in convention.[1]

That the house of representatives have sole power of impeachment and choose their speaker and other officers was furthermore according to Blackstone.[2]

Article V, sections 1, 2, 3 and 4 that senators be chosen by the state legislatures, two for each state, each with one vote, with their classification and their qualifications; and that the senate choose its president and other officers, and vacancies be supplied by the executives of the respective states is all Pinckney draft, Article IV, conforming to resolution 4 of the convention in convention. That the senate choose its own president and other officers was further according to the rule in the house of representatives, rather than according to the precedents.[3] But this was to be changed as will be observed. The classification of senators was according to the constitution of New York. It may be observed here that the Pinckney draft accorded with the Virginia plan in choosing the senate or the second branch by the first branch or the House of Delegates, as the latter was called in the state of Virginia; and this, together with the next article of this draft, would appear to imply some pur-

[1] The clause in section 4 that the ratio of representation be 1 to 40,000, inhabitants is the ratio of the compromise report of committee, of July 5th, heretofore referred to, adopted by convention, and used as a basis for estimating the present membership of the House of Representatives, as set out in section 3.

[2] Black. Com., book 4, chap. 19, p. 260; book 1, chap. 2. p. 180.

[3] In Great Britain the presiding officer of the House of Lords was appointed by the King's commission. Black. Com., book 1, chap. 2, p. 181.

pose in the Pinckney draft, as in the Virginia plan, to make the senate dependent upon the popular branch of the legislature, as was even then the tendency of Great Britain.

Article VI, sections 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, are the Pinckney draft in its order, with some additions; thus where by that draft each state prescribed the time and manner of holding elections for the popular branch of the legislature—leaving that branch to prescribe for the senate, according to Article X of the Pinckney draft—by the rough draft of the convention each state was to prescribe for elections for *both* branches and was to prescribe the place as well as the time and manner of elections; but the legislature of the United States might alter such provisions.[1] Then it was inserted in conformity to resolution 23 of the convention that the legislature of the United States might establish qualifications of property for members of each house.[2] The several sections 3, 4, 5, 6, 7 are according to Great Britain, being parliamentary rules familiar, it may be submitted, to the legislatures of the several states.[3] Some of these, as the privileges of members from arrest and of freedom of speech—to be found in the Confederation—are very ancient indeed.[4] Section 8 appears in the constitution of South Carolina, at least, among the several states. Section 9 conforms to resolutions 3 and 4 of the convention; and section 10 is according to Article V of the Confederation. Section 11, Article VI, of the enacting style of laws is parliamentary form, for the house of representatives and senate; and section 12, that each house originate bills, conforms to resolution 5 of the convention, excepting on bills for revenue, as observed. Section 13 is the Pinckney draft in its order—the last paragraph of Article V thereof—only adding that in passing laws over the president's veto the ayes and nays be entered

[1] Section 1.
[2] Section 2.
[3] Black. Com., book 1, chap. 2, pp. 181, 163, 164, 165.
[4] Crabbe's History of English Law.

on the Journal. Its further precedent appears in the constitution of New York, whence its substance was drawn for the resolution of the convention thereon, as has been observed.

Thus far it may be noted the constitution is drafted on the Pinckney draft, conforming it to the resolutions of the convention in convention. The Pinckney draft—which it will be observed was the only draft in detail submitted to the convention at any time, was itself according to the Confederation and the constitution of Great Britain, and thence the constitutions of the several states. But in conforming to the resolutions of the convention the draft was interpretable to the Jersey plan. So it was in following the Confederation in details; and as its further provisions of detail from the constitutions of Great Britain or the several states would affect the interpretation only *in details,* the draft thus far would appear to be interpretable to the Jersey plan as well as conformable to the resolutions of the convention.

Article VII, section 1 of the rough draft of the convention, on the legislative powers, which is next in order: clause 1, that the legislature of the United States shall have power to lay and collect taxes, duties, imposts and excises, is next in order of the Pinckney draft, being article 6, clause 1 thereof; and accords with the power of taxation of Great Britain and the several states. The principal forms of taxation in Great Britain were taxes, duties, imposts and excises. It is stated in the Wealth of Nations, in 1776, that "the land-taxes, the stamp-duties and the different forms of customs and excises constitute the four principal branches of British taxes."[1] And the same appears from Blackstone.[2] But land-taxes were the main form of those taxes which were apportioned to the counties of England, the quotas of each being then

[1] Adam Smith's Wealth of Nations, published 1776, book 5, chap. 3, Thorold Rogers's edition, vol. 2, p. 535–6.

[2] Black. Com., book 1, chap. 8.

assessed on and collected from the inhabitants thereof, their real and personal property; and stamp-duties, customs and excises were the main forms of those taxes which extended all one and undivided or unapportioned throughout the kingdom; the apportioned taxes being called taxes, or, strictly, direct taxes, because, it may be submitted, they were taxes on the several counties direct instead of only indirect or consequential as were those extending throughout all the counties, that is throughout the kingdom; and because moreover, they were administered to the inhabitants of the counties whereby the money flowed directly into the national treasury instead of through and by way of the treasuries of the several counties, as appears to have obtained in ancient times; and those taxes extending throughout the kingdom being called duties, perhaps in contra-distinction from taxes or direct taxes, which were the older.[1]

From England the same obtained in the several colonies, and thence in the several states, Great Britain having attempted to levy apportioned taxes by requisition to the several colonies, and having also laid duties by stamps and on imports throughout all the colonies; and the several colonies having laid and collected direct taxes and also duties on imports and excises.[2]

But this could also be interpreted to the Jersey plan. As observed, that plan offered, in two paragraphs, the two kinds of revenue recited in the Declaration of Rights as having been attempted by Great Britain on the several colonies; in one paragraph, requisitions with authority to Congress to direct their collection in non-complying states and pass acts di-

[1] Dowell's History of Taxes and Taxation in England. Gneist's Constitutional History of England, vol. 2, p. 4. Black. Com., book 1, chap. 8.

[2] In the Observations on the Commerce of the American States, by Lord John Sheffield, 1784, London, he says, at page 241: "Before the war the expenses of the provincial governments of America were defrayed by a poll-tax and assessment on estates; and by an impost on exports and imports. The mode of taxation differs, however, in the several provinces. In New England, a general excise has been laid on all foreign articles."

recting the same, and in the other paragraph duties by stamps and on imports and by postage. Taxes or direct taxes could be interpreted to the former paragraph, duties and imposts to the latter, thus leaving only excises in difference, which having been of comparatively less importance, seemingly, do not appear in the Declaration of Rights.

Power to regulate commerce with foreign nations and among the several states was from the Pinckney draft in order, and also the Jersey plan. It also was power which Great Britain sought to exercise over the several colonies and was recited in the Declaration of Rights and other papers and addresses of the period; the colonies having admitted the right of Great Britain to exercise this power in good faith and not for the purposes of revenue, but insisting that it was made a pretense for taxation without consent.

Throughout those proceedings prior to the Revolution the regulation of commerce external to the several colonies, that is among them and with foreign nations, was constantly coupled with taxation throughout the colonies by stamp duties, duties on imports—as, for instance, the duty on tea—and postage; and their constant association continuing throughout all the proceedings of the intervening period, in Congress, in the Annapolis convention, etc., until they were taken up together in the Pinckney draft and the Jersey plan and inserted in the Constitution, serve to indicate how they represented the power of Great Britain over the several colonies passing, in consideration of representation therein, to the American Union. The necessity for these powers has been usually recited as a commercial necessity. *So the meaning attached to direct taxes has been a commercial, economic meaning.* No doubt the commercial point of view was common enough; but it would appear that political conceptions dominate commercial views in the proceedings leading up to the adoption of

the Constitution as certainly as in those leading to dissolving allegiance to Great Britain; and that the issues of taxation and regulation of commerce between Great Britain and the several colonies were merely commercial, pecuniary, has always been denied.

Power to esablish a uniform rule of naturalization throughout the United States appears in the Pinckney draft, and was also offered by the Jersey plan.[1] Power to coin money, and the next—to regulate the value of foreign coin—appear in the Pinckney draft, from article 9 of the Confederation and Union, that "the United States in Congress assembled shall have sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority or by that of the respective states;" but Congress shall neither "coin money nor regulate the value thereof" without the assent of nine states. This power was then in exercise. October 16, 1786, an ordinance was passed by Congress for establishing a mint for regulating the alloy and value of coin. Power to fix the standard of weights and measures appears in the Pinckney draft, from article 9 of the Confederation that Congress shall have sole and exclusive right and power of "fixing the standard of weights and measures throughout the United States." This power was in exercise. July 6, '85 Congress resolved that the money unit of the United States of America should be one dollar.[2] Power to es tablish post-offices appears in the Pinckney draft from article 9 of the Confederation that Congress shall have power "establishing and regulating post-offices from one state to another throughout the United States." July 26, '75, Congress exercised this power making provision for a postmaster general and deputies and for a line of posts and cross-posts. It was among the first powers requiring exercise by the Continental Congress and thence adopted into the

[1] Resolution 10.

[2] See Journal of Congress of that date, and of August 8, 1786.

Confederation. September 4, '86, and November 1, '86, appear instances of contracts for conveying mails.

Power to borrow money and emit bills on the credit of the United States appears in the Pinckney draft, from article 9 of the Confederation authorizing Congress to appoint a "committee of the states" "to borrow money or emit bills on the credit of the United States;" but Congress should not "emit bills nor borrow money on the credit of the United States" except with the assent of nine states. And article 12 of the Confederation provides that "all bills of credit emitted, moneys borrowed and debts contracted by or under the authority of Congress before the assembling of the United States in pursuance of the present Confederation shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged." This was not only one of the powers exercised earliest by Congress, but one exercised most frequently. The Journal abounds with instances. June 22, '75, Congress resolved that a sum not exceeding two million Spanish milled dollars be emitted by Congress in bills of credit for the defense of America, and that the Twelve Confederated Colonies be pledged for the redemption thereof. And the form of these bills was resolved on as follows: "Continental Currency No. ——. ——— Dollars. This bill entitles bearer to receive ———— ———— Spanish milled dollars or the value thereof in gold or silver, according to the resolution of Congress held at Philadelphia the 10th of May, 1775." And as observed, this power thus exercised by the Continental Congress was adopted into the Confederation, not only prospectively, but retrospectively as well, by article 12.

Likewise from the very first, Congress exercised the power adopted thence in the Confederation and Union of making bills of credit emitted by authority

of Congress a lawful tender in the payment of debts; recommending to the several states to provide ways and means therefor. According to the Confederation and Union these recommendations were orders and directions to the several states, for the several states were to execute and administer the legislation of the United States in Congress assembled. January 14, '77, Congress resolved that all bills of credit emitted by authority of Congress should be lawful tender in the payment of debts, and the several states were recommended to pass laws to that end and for the punishment of offenders against such laws. So with the resolutions of December 27, '76 and January 11, '76. March 16, '81 and March 20, '80 the several states were recommended by resolutions of Congress to amend and revise their laws declaring bills of credit emitted by authority of Congress to be lawful tender. July 29, '75, and December 26, '76, appear resolutions making the bills of credit of Congress receivable in payment of quotas of taxes of the several states.

Power to appoint a treasurer by ballot appears in the Pinckney draft, its further precedent being it would seem, article 9 of the Confederation conferring power on Congress to appoint besides the "committee of the states" "such other committees and civil officers as may be necessary for managing the general affairs of the United States;" under which power a cabinet was then exercising office. December 23, '84, Congress resolved upon the erection of houses for Congress and for the executive offices, the president, the secretary of foreign affairs, the secretary of war, of marine, and the offices of the treasury. July 30, '79, Congress had established a board of treasury and regulated the same September 11, '81. Power to appoint a single treasurer was some change. July 26, '75, Congress had provided for postmaster general and deputies as observed, and February 7, '81, had resolved upon the appointment of a superintendent of finance, a secretary of war and a secretary of marine.

Power to constitute tribunals inferior to the supreme court appears in the Pinckney draft, not from the Confederation, nor was it in the Jersey plan, which offered no inferior tribunals as observed; but it had been explicitly resolved upon by the convention in convention.

Power to make rules concerning captures on land and water appears in the Pinckney draft in the expression of power "to make rules for captures from an enemy;" from article 9 of the Confederation conferring power on Congress "of establishing rules for deciding in all cases what captures on land and water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated;" and also conferring power "to establish courts for receiving and determining finally appeals in all cases of captures." Exercised November 25, '75, by the Continental Congress recommending to the several legislatures to erect courts of justice or give jurisdiction to the courts in being to determine concerning captures, appeals to be allowed to Congress in all cases; and adopted thence into the Confederation. December 4, '81, Congress enacted an ordinance declaring what captures on water should be lawful. January 15, '80, Congress established courts of appeal in cases of captures, appointed and commissioned three judges, and a register for the court, trials to be according to the law of nations and not by jury. May 23,'80, Congress established rules and directions to courts of appeal in captures. January 8, '82, and February 26, '82, the same were amended. November 25, '75 Congress having provided for appeals in cases of captures from the courts of the several colonies to Congress, September 30, '76, an appeal from New Hampshire to Congress in a case of capture was entertained, and a committee appointed to hear and determine the same.[1]

[1] As to Congress's exercise of power over the court of appeals in cases of captures, see Carson's History of the Supreme Court of the United States, pp. 13–14.

Power to declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offenses against the law of nations: these appear in Pinckney draft, but they are three separate powers; the first appears from article 9 of the Confederation empowering Congress to appoint courts for the trial of piracies and felonies committed on the high seas; exercised April 5, '81, by ordinance appointing courts for trial of piracies and felonies and prescribing punishment therefor; the same being amended March 4, '83. The second of these, Congress had exercised by recommending to the several legislatures of the United Colonies to pass laws to punish counterfeiting continental bills of credit or whomever should knowingly pass the same, June 24, '76. June 19, '80, Congress offered a reward of $2,000 to whomever should prosecute to conviction any person for counterfeiting. The third of these, Congress exercised November 17 and 23, '81, recommending to the several states to provide punishment for offenses against the law of nations, enumerating particularly among such offenses, (1) the violation of safe conduct and passports; (2) acts hostile to those in amity or league with the United States; (3) infractions of immunities of ambassadors and other public ministers; (4) infractions of treaties and conventions of the United States; and also recommending the several states to erect tribunals or vest existing ones with the power to decide offenses against the law of nations not in the foregoing enumeration. May 30, '83, appears a resolution of Congress requiring the several states to remove obstacles against British creditors recovering debts by virtue of the treaty with Great Britain.

Power to subdue a rebellion in any state on the application of its legislature appears in the Pinckney draft, and was also included in the Jersey plan in

some degree, by its resolution offering authority to coerce states or bodies of men therein, who should oppose the execution of the acts and treaties of the United States. It was required by the experience of Shays' rebellion in Massachusetts, occasioning the memorial of the government thereof to Congress concerning aid for suppressing same, received by Congress and entered in the Journal March 9, '87, and referred to committee. Power to make war appears in the Pinckney draft—but among the powers conferred on the Senate alone, rather than among those of both houses—from article 9 of the Confederation; exercised June 13, '76, when Congress appointed a board of war at the opening of the Revolution. Power to raise armies; from the Pinckney draft; exercised by Congress resolving December 27, '76 vesting General Washington with full and ample power to raise and collect from any and all of the United States battalions of infantry, regiments of light horse; of artillery and engineers; in addition to those already voted by Congress; to apply to any of the states for aid of the militia as he should deem proper; this power to reside in him for six months unless sooner determined by Congress. This power it will be observed was to raise armies throughout the United States regardless of the several states and hence was an indirect levy only upon the several states, in contrast with calling out state militia, which was a direct levy on the several states.[1] Power to build and equip fleets: from the Pinckney draft, and Confederation article 9, that Congress have power to "build and equip a navy;" exercised November 28, '75 by the rules of Congress issued then for the regulation of the navy of the United Colonies of North America then in course of equipment. Power to call forth the militia to execute the laws, enforce treaties, suppress insurrections and repel invasions, from the Pinckney draft, and Confederation

[1] Thus troops, like taxes, are levied from the several states directly and indirectly.

article 9, that Congress have power to agree upon the number of land forces and make requisition from each state for its quota in proportion to the number of white inhabitants of each state, which requisition it was provided should be binding; and the quota "shall march to the place appointed and within the time agreed on in Congress." Congress also had power to appoint a commander in chief by the Confederation and all general officers above colonels. Of the purposes for which the militia are to be called out, that to enforce treaties arises from the difficulties growing out of the treaty with Great Britain; that to suppress insurrections was occasioned by Shays' rebellion in '86, and that to repel invasions by the invasion of Great Britain, as it was called after the Declaration of Independence, to put down the Revolution.

Power to make all laws that shall be necessary and proper for carrying into execution the foregoing powers, and all others vested by this Constitution in the government of the United States, or any department or officer thereof, appears in the Pinckney draft providing power "to make all laws for carrying the foregoing powers into execution." Of this it may be observed, as will be more dwelt on later, that by the Confederation and Union the laws of the United States of America were made by the United States in Congress assembled to be executed and administered by the several states, the latter being for the execution and administration of the laws of the former, subject to the authority and direction of Congress, and the conduct of the government of the United States of America requiring the concurrent action of both Congress and the several states. But the latter failing of their part, neglectfully or wilfully, the failure of the Confederation and Union was the failure of the execution and administration of the laws thereof, and this occasioning the convention of 1787, it followed that its chief work was the establishment for the Union of agencies of its own to execute and adminis-

ter the laws of Congress, whereby the government of the United States would become independent of the several states. These agencies were the executive and judiciary departments. Yet the Confederation and Union had been interpreted that the right of Congress to make the laws of the United States implied their right to enforce their execution and administration, and to make all laws necessary and proper to that end. An instance of the former is Mr. Madison's claim of the inherent and implied right of the Union to coerce the several states to execute and administer the laws of Congress; and an instance of the latter is the ordinance of Congress of December 31, '81, for the incorporation of the Bank of North America, which act initiated the controversy between the Union and the several states respecting national banking, extending over fifty years. But whether or not by the Confederation and Union Congress had power to make all laws necessary and proper for carrying into execution the foregoing powers and all others vested in the government of the United States would appear of no moment, for precedent thereof is found in the purposes of Congress by the Confederation, and in the powers of the legislatures of Great Britain and the several states, and accordingly was conferred by the resolutions of the convention.

Thus all the legislative powers of the rough draft of the Constitution appear in the Pinckney draft, most of them having been vested in or exercised by Congress by the Confederation and the others appearing in the Constitutions of Great Britain and the several states. As, by the Confederation Congress had the interpretation of their own powers, their exercise of power not expressly vested in them by the Confederation, perhaps vested those powers in Congress by construction of the Confederation. If so, the Jersey plan would differ from the national plan only in interpretation, for it offered all the powers vested in Congress

by the Confederation and also the new powers; but the *interpretation and construction* of all these powers the Jersey plan would give to the several states rather than to the United States.[1] But though the legislative powers of the rough draft were interpretable to the federal plan, it is manifest that they were interpretable to the national plan only so far as the particular powers conferred, beyond those vested in Congress by the Confederation, extended to all cases for the general interests of the Union, and where the separate states were incompetent or their individual legislation might interrupt the harmony of the Union: that is so far only as the powers of Congress by the rough draft conformed to the purposes of Congress by the Confederation; to the powers of the legislatures of Great Britain and of the several states; and were the legislative powers of perfect union.

Article 7, section 2, of the rough draft respecting treason is according to the Pinckney draft in its order—excepting only the consequences of forfeiture and corruption of the blood—having been theretofore exercised by Congress, and being moreover, including the consequences of forfeiture and corruption of the blood, in Blackstone.[2] June 24, '76, Congress resolved "that all persons residing in any of the United Colonies and deriving protection from its laws owe allegiance to the said laws and are members of such colony;" " and all members of any of the United Colonies who shall be adherents to the king of Great Britain giving him aid or comfort shall be deemed guilty of treason." Perhaps this is the only provision of the rough draft beyond those contained in the resolutions of the convention requiring difference of construction between the federal and the national plans. It will be observed that in the rough draft and the

[1] There is an exception here in the power to constitute tribunals inferior to the supreme court, which the Jersey plan did not offer, but the difference in this respect appeared in the proceedings of the convention prior to the reference to the committee of detail, as observed.

[2] Black. Com., book 4, chap. 6. pp. 81–2; book 4, pp. 356–7, 382–9.

Pinckney draft the phrase " the United States or any of them," serves to consider the states jointly or severally, wherefore treason, being directed against the sovereign, might be interpreted against the states jointly or severally.

Article 7, section 3, is the Pinckney draft in order, conforming to resolution 9 of the convention, the Pinckney draft having proposed direct taxation according to the number of free inhabitants only, that is not including slaves, which was according to the Virginia plan in its second alternative, as observed. Article 7, section 4, that no tax shall be laid on exports or on the importation of slaves, nor shall their importation be prohibited, is the Pinckney draft in order as to exports. So is section 5 that no capitation-tax shall be laid except according to the census; and section 6 that no navigation act be passed without the assent of two-thirds of each house. These three sections, 4, 5 and 6, were not questioned between the United States and the several states, but between the North and South. The South wanted sections 4 and 5, to obtain which they sought to impose section 6 on the North. This is shown by the reference of the three sections together to a grand committee August 22, and report therefrom August 24, and its adoption August 25 and 29. It appears in the debates of those dates, and has always been so recognized.[1] These three provisions arose from the controversy of the period rather than from precedent. The navigation act, however, was a British regulation of commerce that all commerce should be carried in British bottoms, with the captain and three-fourths of the crew British.[2] Capitation taxes were taxes whereby revenue was derived on account of slaves by the Roman empire, and they may have been in use in slave states. The Roman empire apportioned taxes to the prov-

[1] See page 189 hereof, and Fiske's Critical Period of American History.

[2] Black. Com., book 1, chap. 13, pp. 418-19; Crabbe's History of the English Law.

inces first by requisition administered there, later the empire administering them, assessing them on and collecting them from their inhabitants, their real and personal property. Such taxes were called direct taxes, the main forms being land-taxes, capitation-taxes and poll-taxes, and in the capitation were included slaves.[1]

Article 7, section 7, that the United States grant no title of nobility is the Pinckney plan in order, from Confederation article 6, first paragraph, being deemed of the essence of republican form of government. Article 8 on the supremacy of the acts and treaties of the United States is the Pinckney draft in order, conforming to resolution 7 of the convention, from the Confederation as aforesaid.[2] In the Pinckney draft also appears the word "constitution" replacing the words "articles of union" according to the constitutions of the several states and of Great Britain; and Blackstone speaks of the charters of the several colonies as their "constitutions."[3]

Article 9, section 1, that the senate shall have power to make treaties, appoint ambassadors and judges of the supreme court is the Pinckney draft in order, which included also power to declare war. By the Confederation all these powers belonged to Congress; by the British constitution to the executive;[4] yet not wholly to the executive according to the interpretation of the British Constitution of that day. By the rough draft it will be observed that these great powers were left with the branch composed according to Congress by the Confederation and the Jersey plan, excepting the war power, which was conferred on both branches. Article 9, section 2, of controversies be-

[1] History of the Decline and Fall of the Roman Empire, Edward Gibbon, first publication 1776, 1781-2, chap. 17; Victor Duruy's History of Rome, translated by Ripley & Clarke, vol. 6, p. 252; vol. 2, p. 239. Gibbon's authority on Capitation Taxes is noted in Cooley on Taxation, p. 25, note 2.

[2] See page 190, note that the Pinckney draft also contained a *direct* negative on the several states.

[3] Black. Com., Introd., sec. 4, vol. 1, p. 107.

[4] Black. Com., book 1, chap. 7, pp. 253, 257, 266-7.

tween states concerning jurisdiction or territory, and conferring jurisdiction thereof on the Senate, appears in the Pinckney draft next in order, whence drawn from the Confederation article 9, where this jurisdiction was in Congress; but where the Pinckney draft had drawn only the substance from the Confederation the Constitution draft adopts the entire provision in the language of the Confederation. And the latter also draws section 3 following, concerning controversies over lands claimed under grants of different states, from the Confederation, conferring jurisdiction thereof also on the senate. Both these provisions had been theretofore exercised by Congress, upon the occasions of controversies between Pennsylvania and Virginia over "Mason's and Dixon's line;" between Massachusetts and New York; between citizens of Pennsylvania and Connecticut, over the territory of Wyoming.[1] As early as December 20, '75, Congress resolved that whereas disputes between the inhabitants of Pennsylvania and Connecticut on the Susquehanna were prejudicial of the United Colonies, they recommended peace and quiet until a legal decision could be had on the said disputes, or until Congress should take further order thereon.

Article 10, section 1, of the executive, is the Pinckney draft, conforming to resolution 12 of the convention. The style "President of the United States of America" is suggested by that of the president in the Confederation, and the executive in some states was called president. Article 10, section 2, is the Pinckney draft conforming to the same resolution of the convention and adding power to convene Congress on extraordinary occasions, and in case of disagreement of the houses to adjourn them. This section supplements the executive power of Congress by the Confederation, which had been executed in some degree by the president of Congress, with the power of the executives of Great Britain and of the several states—

[1] Carson's History of the Supreme Court of the United States.

though the executives of the several states had been more or less restricted in consequence of the abuses of the crown and crown governors, as observed. Giving information of the state of the Union, proposing legis lation, convening the houses on extraordinary occa sions, adjourning them; and the pardoning power, but not in bar of impeachment; were powers of the crown.[1] Power to appoint and commission officers of the United States, to receive ambassadors and cor respond with the several state executives were executive powers of Congress by the Confederation, as was also the power to appoint a commander in chief of the army and navy and militia of the several states, which commander-in-chief the president now became by the Constitution. The Jersey plan had offered executive power to appoint federal officers and direct military operations, as well as general power to execute the laws.[2]

Article 11, section 1, of the judicial power and how vested is the Pinckney draft in order, conforming to the convention's resolutions thereon; and section 2 of the term of office and compensation of judges is the same. Article 11, section 3, of the jurisdiction of the judiciary, is the Pinckney draft in order, with additions as to controversies between states or citizens thereof and foreign states. Jurisdiction of cases arising under the laws of the United States conforms to the resolution of the convention, according to Great Britain and the several states as aforesaid; but instead of the further provision of jurisdiction of questions touching national peace and harmony, as aforesaid, appear jurisdiction of particular cases: of these

[1] Black. Com., book 1, chap. 3, pp. 150, 186, 189; book 1, chap. 7, pp. 262, 269; book 4, p, 261.

[2] The following were executive powers of Congress by the Confederation: to appoint a president; to appoint a commander-in-chief of land and naval forces; to direct operations of land and naval forces; to appoint all officers of land and naval forces except regimental officers of land forces; to commission all officers of the service of the United States; to appoint commissioners and civil officers for managing the general affairs of the United States; to send and receive ambassadors.

the jurisdiction of cases affecting ambassadors and other public ministers and consuls was occasioned by cases recently arisen between the United States and the several states under foreign treaty as observed, and the Jersey plan offered jurisdiction of cases affecting ambassadors; jurisdiction of impeachments of officers of the United States was also in the Jersey plan; cases of admiralty and maritime jurisdiction had arisen under the power of Congress over cases of captures from the enemy and piracies and felonies on the seas, thus occasioning the jurisdiction, and particular jurisdiction of captures from the enemy and piracies and felonies on the seas was offered by the Jersey plan; jurisdiction of controversies between states, and states and citizens of other states; citizens of different states; and a state or citizens thereof and foreign states, citizens or subjects was occasioned by cases arisen under the jurisdiction of Congress by the Confederation as observed; and the Jersey plan had offered jurisdiction of cases in which foreigners should be interested, in the construction of treaties, and of disputes between the United States and any individual state—but the latter only respecting territory. Therefore the jurisdiction of particular cases conferred by the rough draft having been mostly offered by the Jersey plan there was little difference between them, it may be submitted, except in respect of the general jurisdiction of the constitution draft extending to cases arising under the laws of the United States. And this jurisdiction might be interpreted to the Jersey plan it will be observed, by construing the clause as merely introductory to or declaratory of the succeeding particular jurisdictions; as if the section should read, The judiciary shall have jurisdiction of cases arising under the laws of the United States, to-wit, the following: cases affecting ambassadors, etc.[1]

[1] Such interpretation of the judicial power corresponds to the interpretation of legislative power which has always prevailed, confining it to the particular powers which follow the general power of Congress, as will be observed.

Article 11, section 4, that trials of crimes be in the state where committed and by jury—the jury of the vicinage, is the Pinckney draft, and the elemental law of Great Britain; as also would appear to be section 5, concerning the extent of judgment in impeachment and the further liability to trial according to law; though this latter section was not in the Pinckney draft.

Articles 12 and 13, that no state shall coin money, grant letters of marque and reprisal, enter any treaty, etc., or grant any title of nobility; or without consent of Congress emit bills of credit, or make anything but specie a payment of debts; lay imposts; keep troops or ships of war in time of peace; enter any agreement with another state or foreign power; engage in war unless invaded, etc., all appear in the Pinckney draft article 11, excepting the first that no state shall coin money: prior to the Pinckney draft all but the first appear in the Confederation, article 6, except those regarding bills of credit and specie in payment of debts. The three last named, respecting coining money, bills of credit and specie payments were occasioned by the financial experience of the recent period, the depreciation of the money of the several states.[1]

Article 14, that citizens of each state shall have all the privileges of citizens of the several states, and article 15 for delivering up fugitives from justice, and article 16 concerning the faith to be given in each state to the acts and proceedings of other states, are the Pinckney draft in order, from articles 12 and 13 thereof, which are from Confederation, article 4, but with amendment that faith be extended to the acts of legislature of the several states, as well as to their judicial proceedings.

Article 17 is resolution 17 of the convention in convention, coupled with article 14, the next in order of the Pinckney draft, but with some omissions and ad-

[1] Fiske's Critical Period of American History.

ditions: thus there is omitted from the resolution of the convention the clause "whether from a voluntary junction of government and territory or otherwise," which omission would perhaps serve to leave it open to construction whether states may be admitted, arising within the limits of the United States from a junction of government and territory otherwise than voluntary;[1] and it is added (1) that if a new state arise within the limits of any of the present states the consent of such state should be necessary to its admission; and (2) Congress might make conditions with new states concerning the public debt then subsisting. Of the precedents of these—what appears to be the limits of the United States has already been observed: two-thirds was the number of each branch to be required to amend the Union; the consent of the legislature to the admission of any state arising within the limits of any of the present states refers to the case of Vermont.[2] The public debt was then so heavy an obligation as to occasion the provision that it might be shared by future states as they arose.

Article 18 of the guaranty to each state of republican form of government is resolution 18 of the convention; resembled, however, by the next in order of the Pinckney draft, article 15. Article 19 is article 16 of the Pinckney draft, the first half thereof, conforming to resolution 19 of the convention. Article 20 is resolution 20 of the convention, the Pinckney draft having made no provision thereupon. Article 21 is the last of article 16 of the Pinckney draft. Article 22 is resolution 21 of the convention with some change, substituting the word "constitution" for the words "articles of union." Article 23 adds a provision beyond the Pinckney draft for introducing the government.

[1] The fall of New France in America to Great Britain with the assistance of the several colonies in 1763, was an example to America of the junction of territory and government by acts otherwise than voluntary.

[2] Fiske's Critical Period of American History, and Bancroft's History of the United States.

Thus the first draft of the constitution follows the Pinckney draft throughout, conforming it to the resolutions of the convention in convention, and the Pinckney draft follows the Confederation, supplementing it from the constitutions of Great Britain and the several states.[1] Nor as it would appear was much alteration required in the Pinckney draft, which it will be remembered was introduced

[1] Of the conforming of the first draft to the resolutions of the convention in convention, the following may be set out in addition: Resolution number 1, that the Government of the United States consist of supreme, legislative, executive, and judiciary, appears in article 2 of the draft. Resolution 2 of the convention in convention, that the legislature have two branches, appears in article 3 of the draft. Resolution 3, that the first branch of the legislature be chosen by the people, with its provisions for duration of office of members, age, compensation, etc., appears in article 4, sections 1 and 2. Resolution 4, that the second branch be chosen by individual legislatures, with its provisions for duration of office of members, etc., in article 5, sections 1 and 2. Resolution 5, that each branch of the legislature originate acts, article 6, section 12, subject to resolution 10 on money bills. Resolution 6, concerning the legislative power: In the place of the provisions of this resolution, that the national legislature should have one general power, appear enumerated particular powers; article 7, section 1. Resolution 7, declaring the supremacy of the acts and treaties of the United States, is article 8, the words "articles of union" being replaced by the word "constitution," according to the precedent constitutions. Resolution 8, ascertaining how many members in the first branch of the legislature each state shall have at first, and that in future the legislature regulate representation according to population, appears in article 4, sections 3 and 4. Resolution 8 continued, and resolution 9, that direct taxes be proportioned according to the ratio of the resolutions of April 18, 1783, to be estimated by the census, appears in article 7, section 3. Resolution 10, that revenue bills originate in the first branch of the legislature to be not altered or amended by the second branch, article 4, section 5. Resolution 11, that the several states vote equally in the second branch, article 5, section 1. Resolution 12, of the executive, of what it shall consist and of its powers, article 10, sections 1 and 2. Resolution 13, of the executive negative or veto, article 6, section 13. Resolution 14, of the judiciary, the supreme tribunal, and of what it shall consist, article 11, sections 1 and 2, and article 9, section 1. Resolution 15, of inferior tribunals, article 11, section 1. Resolution 16, of the jurisdiction of the judiciary: Here, instead of jurisdiction of cases arising under the laws of the United States, and such other questions as involve the national peace and harmony, appears jurisdiction of cases arising under the laws of the United States, and then follow enumerated and particular cases: article 11, section 3. Resolution 17, of the admission of new states, article 17, but omitting the clause "whether from a voluntary junction of government and territory or otherwise." Resolution 18, of the guaranty of republican government to each state, article 18. Resolution 19, of amending the articles of union, article 19. Resolution 20, of oaths to support the Union, article 20, substituting "constitution" for "articles of Union." Resolution 21, of the amendments of the convention to the Confederation, article 22, substituting "constitution" for "Confederation." Resolution 22, of representation in the second branch of the legislature, article 5, section 1. Resolution 23, of qualifications of property and citizenship: qualifications were not taken up for the executive or judiciary, but for the legislature, appear in article 6, section 2, article 4, section 2, and article 5, section 3.

with the Virginia plan. The resolutions of the convention in convention are conformed to in every respect save that legislative power, which in the resolution of the convention was one general power supplementing the power of Congress by the Confederation in all cases for the general interests of the Union, and where the separate states are incompetent or their legislation might interrupt the harmony of the Union —that is, one general power conforming to the purposes of Congress by the Confederation and to the legislative powers by the constitutions of Great Britain and the several states,—appears in the rough draft of the Constitution as several particular powers, according to the federal plan: moreover, judicial power, which in the resolutions of the convention was general power extending to cases arising under the laws of the United States, and to such other questions as involve the national peace and harmony, becomes in the rough draft general power extending to all cases, as aforesaid, followed by several particular powers: then there is the omission in the provision for the admission of new states of the clause respecting the manner of their arising, and no qualifications of property or citizenship for the executive or judiciary appear; but otherwise the resolutions of the convention are conformed to by the constitution drafted on the Pinckney draft. Conforming to the resolutions of the convention, the rough draft was interpretable to the federal plan as observed: so it was in following the Confederation in details; and in the further provisions of detail from precedent constitutions nothing appears to obstruct such interpretation. Therefore the rough draft of the Constitution conformed to the national plan, with the exceptions noted, yet was interpretable to the federal plan.

REVISED DRAFT OF THE CONSTITUTION.

REPORTED SEPTEMBER 12, 1787, BY THE COMMITTEE OF REVISION.

[Paper furnished by General Bloomfield. The original is Mr. Brearly's copy of the draft, with manuscript interlineations and erasures of the amendments adopted on the examination and discussion.]

We, the people of the United States, in order to form a more perfect union, to establish justice, insure domestick tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ART. I.—SECT. 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECT. 2. The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several states, which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to servitude for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every forty thousand, but each state shall have at least one representative, and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three. When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their speaker and other officers; and they shall have the sole power of impeachment.

Sect. 3. The Senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof for six years; and each senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided, as equally as may be, into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year; of the second class at the expiration of the fourth year; and of the third class at the expiration of the sixth year; so that one-third may be chosen every second year. And if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature.

No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

The Vice-President of the United States shall be, ex officio, president of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall choose their other officers, and also a president pro tempore, in the absence of the Vice President, or when he shall exercise the office of President of the United States.

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present. Judgment in cases of impeachment, shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

Sect. 4. The times, places, and manner, of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations.

The Congress shall assemble at least once in every year; and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

Sect. 5. Each house shall be the judge of the elections, returns, and qualifications, of its own members; and a major-

ity of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each house may provide.

Each house may determine the rules of its proceedings; punish its members for disorderly behaviour, and, with the concurrence of two-thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may, in their judgment, require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the Journal. Neither house, during the session of Congress, shall, without consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

Sect. 6. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to, and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

No senator or representative shall, during the time for which he was elected, be appointed to any civil office, under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

Sect. 7. The enacting style of the laws shall be, "Be it enacted by the senators and representatives in Congress assembled."

All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills.

Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States. If he approve, he shall sign it; but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their Journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be

sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by two-thirds of that house, it shall become a law. But in all such cases, the votes of both houses shall be determined by yeas and nays; and the names of the persons voting for and against the bill shall be entered on the Journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress, by its adjournment, prevent its return; in which case it shall not be a law.

Every order, resolution, or vote, to which the concurrence of the Senate and House of Representatives may be necessary, (except on a question of adjournment,) shall be presented to the President of the United States, and, before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by three-fourths of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Sect. 8. The Congress may, by joint ballot, appoint a treasurer. They shall have power to lay and collect taxes, duties, imposts and excises;

To pay the debts and provide for the common defence and general welfare of the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, among the several states, and with the Indian tribes;

To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States.

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;

To promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies,—but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States—reserving to the states, respectively, the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by Congress;

To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States; and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings; and,

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

Sect. 9. The migration or importation of such persons as the several states, now existing, shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed upon such importation, not exceeding ten dollars for each person.

The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the publick safety may require it.

No bill of attainder shall be passed, or any *ex post facto* law.

No capitation tax shall be laid, unless in proportion to the census hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any state.

No money shall be drawn from the treasury, but in consequence of appropriations made by law.

No title of nobility shall be granted by the United States.

And no person holding any office of profit or trust under them, shall, without the consent of Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

Sect. 10. No state shall coin money nor emit bills of credit, nor make anything but gold and silver coin a tender in

payment of debts, nor pass any bill of attainder, nor *ex post facto* laws, nor laws altering or impairing the obligation of contracts; nor grant letters of marque and reprisal; nor enter into any treaty, alliance, or confederation; nor grant any title of nobility.

No state shall, without the consent of Congress, lay imposts or duties on imports or exports, nor with such consent, but to the use of the treasury of the United States; nor keep troops nor ships of war in time of peace; nor enter into any agreement or compact with another state, nor with any foreign power; nor engage in any war, unless it shall be actually invaded by enemies, or the danger of invasion be so imminent, as not to admit of delay until the Congress can be consulted.

ART. II.—SECT. 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected in the following manner:—

Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in Congress; but no senator or representatives shall be appointed an elector, nor any person holding an office of trust or profit under the United States.

The electors shall meet in their respectives states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves, and they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the general government, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates; and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said house shall, in like manner, choose the President. But in choosing the president, the votes shall be taken by states, and not *per capita,* the representation from each state having one vote. A quorum for this purpose shall consist of a member or members from two-thirds of the states;

and a majority of all the states shall be necessary to a choice. In every case, after the choice of the President by the representatives, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them, by ballot, the Vice President.

The Congress may determine the time of choosing the electors, and the time in which they shall give their votes; but the election shall be on the same day throughout the United States.

No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President; and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President; and such officer shall act accordingly, until the disability be removed, or the period for choosing another President arrive.

The President shall, at stated times, receive a fixed compensation for his services, which shall neither be increased nor diminished during the period for which he shall have been elected.

Before he enter on the execution of his office, he shall take the following oath or affirmation:—

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my judgment and power, preserve, protect, and defend the Constitution of the United States.

Sect. 2. The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States.

He may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices. And he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the sen-

ators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of the next session.

SECT. 3. He shall, from time to time, give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient. He may, on extraordinary occasions, convene both houses, or either of them, and in cases of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive ambassadors and other public ministers. He shall take care that the laws be faithfully executed; and shall commission all the officers of the United States.

SECT. 4. The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ART. III.—SECT. 1. The judicial power of the United States, both in law and equity, shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the Supreme and inferior courts shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

SECT. 2. The judicial power shall extend to all cases, both in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, or other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; or between a state, or the citizens thereof, and foreign states, citizens, or subjects.

In cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appel-

late jurisdiction, both as to law and fact,—with such exceptions, and under such regulations, as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crime shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

SECT. 3. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, nor forfeiture, except during the life of the person attainted.

ART. IV.—SECT. 1. Full faith and credit shall be given, in each state, to the public acts, records, and judicial proceedings, of every other state; and the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings, shall be proved, and the effect thereof.

SECT. 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other crimes, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, and removed to the state having jurisdiction of the crime.

No person legally held to service or labor in one state, escaping into another, shall, in consequence of regulations subsisting therein, be discharged from such service or labor, but shall be delivered up, on claim of the party to whom such service or labor may be due.

SECT. 3. New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claim of the United States, or of any particular state.

SECT. 4. The United States shall guaranty to every state in this Union a republican form of government, and shall

protect each of them against invasion, and, on application of the legislature or executive, against domestic violence.

ART. V. The Congress, whenever two-thirds of both houses shall deem necessary, or on the application of two-thirds of the legislatures of the several states, shall propose amendments to this Constitution, which shall be valid, to all intents and purposes, as part thereof, when the same shall have been ratified by three-fourths, at least, of the legislatures of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided, that no amendment which may be made prior to the year 1808 shall in any manner affect the and sections of article .

ART. VI. All debts contracted, and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states shall be bound, by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office of public trust under the United States.

ART. VII. The ratification of the conventions of nine states shall be sufficient for the establishment of this Constitution between the states so ratifying the same.

FROM THE ROUGH DRAFT TO THE REVISED DRAFT.

The revised and arranged draft having been set out it will be observed how the rough draft changed in its course to the revised draft, reported from committee to whom the proceedings were referred to revise the style of and arrange the articles agreed to by the house, on September 12. The rough draft will be observed in the revised draft, article by article, section by section, the rough draft being mentioned first.

The preamble was put in not by the convention but by the committee of revision of style and arrangement. According to it, the Constitution is made by the people of the United States, to be ratified by the people of the several states, it would appear. Its first purpose, to form more perfect union, appears to be the general purpose of the convention to consolidate the Union. The Letter of the Convention to Congress, or address to the people, as it was called in the resolution of the convention instructing the committee on revision to prepare and report it, says: "In all our deliberations on the subject we kept steadily in our view that which appeared to us the greatest interest of every true American—the consolidation of the Union." The conception of "*most* perfect union" had long obtained: November 4, '75, Congress resolved, "The Congress considering that the most perfect union between all the colonies is essentially necessary for the preservation of the just rights of North America, &c." Whether more perfect union would become most perfect union would be matter of interpretation. The second purpose of the preamble, to establish justice, is that of the judiciary, the third, to insure domestic tranquility is that of the executive; the judiciary and the

executive being the means of administering and executing the power of Congress by the Confederation, the lack of which was the leading defect of the Confederation and the establishment whereof was the great work of the constitutional convention. The last three purposes, to provide for the common defense, promote the general welfare, and secure the blessings of liberty, are the purposes of the Confederation and Union, by article three whereof the states were confederated and united for their common defense, the security of their liberties and their mutual and general welfare. The fourth and fifth purposes, to provide for the common defense and promote the general welfare, are the purposes of Congress by the Confederation for which they were empowered to defray all charges of war and all other expenses and therefor to require the several states to supply the common treasury, as will be observed. Prior thereto Parliament sought to raise revenue from the several colonies—without their representation—for the purpose of the common defense and general welfare of the United Kingdom, as the papers and addresses of the Continental Congress show. The last purpose, the security of liberty is the express purpose, not only of the Confederation, but of the British constitution, according to Montesquieu, who in his analysis of the British constitution says:[1]

"Though all governments have the same general end, which is that of preservation, yet each has another particular object. Increase of dominion was the object of Rome; war, that of Sparta; religion, that of the Jewish laws; commerce, that of Marseilles; public tranquility, that of the laws of China; navigation, that of the laws of Rhodes; natural liberty, that of the policy of the Savages; in general, the pleasures of the prince, that of despotic states;

[1] Montesquieu's Spirit of Laws, book 11; 5.

that of monarchies, the princes and the kingdom's glory; the independency of the individual is the end aimed at by the laws of Poland, thence results the oppression of the whole. One nation there is also in the world that has for the direct end of its constitution political liberty. We shall presently examine the principles on which this liberty is founded; if they are sound, liberty will appear in its highest perfection." Then he proceeds to examine the British constitution.

Thus it will be observed the preamble expresses three new purposes supplementing the three old purposes of the Confederation from the constitution of Great Britain. Finally it will be noted that it is not only for "ourselves" but for "our posterity" that the constitution is ordained and established; and that it is for the United States co-equal with America.

Article 1 of the rough draft, that the style of the government be ' the United States of America,' having been included in the preamble, is omitted from the revised draft. Article 2 of the rough draft, that the government consist of supreme legislative, executive and judiciary, is also omitted from the revised draft, being otherwise shown therein. Article 3, that the legislative power shall be in Congress of two bodies, etc., is article 1, section 1 and paragraph 2 of section 4, article 1, of the revised draft, but the senate is named before the house of representatives according to the precedent constitutions. It may be observed also that the order of arrangement of the three departments of government, the legislative first, then the executive, and then the judiciary, is the same in the revised draft as in the rough draft, in accordance with the usual order of arrangement in the constitutions of the several states.

Article 4, section 1, that the house of representatives be chosen every second year by the people of the several states, the qualifications of electors to be

those of electors of the several states for the popular branch of the legislature is article 1, section 2, paragraph 1 of the revised draft. Article 4, section 2, of qualifications of representatives is article 1, section 2, paragraph 2, but citizenship of three years is changed to seven years. Article 4, sections 3 and 4 are article 1, section 2, paragraph 3, but representatives and direct taxes are coupled together according to the resolution of the convention in convention, both being apportioned according to population ascertained by census as aforesaid. Article 4, section 5, paragraph 1, of bills for revenue originating in the house of representatives is article 1, section 7, paragraph 2, but so altered that the senate may propose or concur with amendments as on other bills; which alteration departing from British precedent, was a concession to the house composed according to the federal plan. Paragraph 2 of appropriations is article 1, section 9, paragraph 6. Article 4, section 6, of the power of representatives to impeach and to choose their speaker and other officers is article 1, section 2, paragraph 5. Article 4, section 7 of vacancies in representation is article 1, section 2, paragraph 4.

Article 5, sections 1 and 2, of the senators, chosen by the state legislatures, two from each state, each with one vote and of their term of office and classification and of vacancies, is article 1, section 3, paragraphs 1 and 2. Article 5, section 3, of the qualifications of senators, is article 1, section 3, paragraph 3, but citizenship of four years is changed to nine years. Article 5, section 4 of the power of the senate to choose its president and other officers, is article 1, section 3, paragraphs 4 and 5, but so altered that the president of the senate shall be the vice-president of the United States, which office is established, as will be observed. And to the senate is given the power to try impeachments, according to the British con-

stitution; this power having been left with the supreme court in the rough draft, from the Pinckney draft.[1]

Article 6, section 1, prescribing for election of members of each house, is article 1, section 4, paragraph 1. Article 6, section 2 of property qualifications of members is omitted, thus indicating that the omission of property qualifications of the executive and judiciary from the rough draft was sanctioned by the convention notwithstanding the instructions of the last resolution of the convention to insert the same.[2] Article 6, sections 3 and 4 of a quorum in each house and its right to judge of qualifications of its members is article 1, section 5, paragraph 1, adding the right of less than a quorum to compel attendance of members. Article 6, section 5 of the privileges of members of freedom of speech and from arrest, is in article 1, section 6, paragraph 1. Article 6, section 6 of each house making its rules, is article 1, section 5, paragraph 2, adding the rule that two-thirds of each house shall be the number required to expel a member. Article 6, section 7 of the journal of each house, is article 1, section 5, paragraph 3, but parts of the journal requiring secrecy may be excepted from publication, which was according to Confederation article 9, the last paragraph. Article 6, section 8, of adjournments of one house without the other's consent is article 1, section 5, paragraph 4.

Article 6, section 9, of the ineligibility of members of each house to other office under the United States during their term, is article 1, section 6, paragraph 2, but the ineligibility is restrained to offices created, or the emoluments whereof shall have been increased during the term in question, and the further ineligi-

[1] Black. Com., book 4, chap. 19, p. 260.

[2] But these instructions in the resolutions of the convention were merely to receive such clauses, there being no determination of the convention to utilize property qualifications. July 26.

bility as to the senate is omitted; and it is added from article 5 of the Confederation that no office holder under the United States shall be a member of either house. Article 6, section 10 of the compensation of members, is in article 1, section 6, paragraph 1 but so altered that compensation shall be made by the United States instead of by the several states. The committee of the whole house had resolved for compensation of members by the United States, but according to the Confederation article 5, each state maintained its own members; the resolutions of the convention in convention left the matter open and the rough draft followed the Confederation as observed: Now, however, compensation was restored to the United States, the idea being, as shown in the debates, that members would be more likely to give adherence to the government, either the United States or their respective state, from which they drew their compensation. Article 6, section 11 of the enacting style of laws, is article 1, section 7, but the senate now precedes the house of representatives, according to the precedents as observed; and the clause "of the United States" is omitted from "the representatives and senate of the United States" thus leaving it open to interpretation to determine whether allegiance of members is due to the United States or to the several states, that is, whether senators and representatives are senators and representatives of the United States from the several states, or are senators and representatives of the several states to or for the United States. Article 6, section 12, that each house may originate bills, is omitted as superfluous.

Article 6, section 13 of the executive negative is article 1, section 7, paragraph 3, enlarging the time within which bills not returned by the president become law from seven to ten days; and adding a new provision as follows: That every order, resolution

or vote to which the concurrence of the senate and house of representatives is necessary, be presented to the president to be approved by him before taking effect, or being disapproved to be passed again by three-fourths of the senate and house of representatives as in the cases of bills. This enlarged the executive negative by requiring matters passed over it to have three-fourths instead of two-thirds of each house in any case of an "order, resolution or vote," leaving the difference between a bill, which would require but two-thirds, and an order, resolution or vote which would require three-fourths of each house to pass it over the executive veto, an open question. But this enlargement of executive power was struck out later by the reduction of the three-fourths to two-thirds in the case of an order, resolution or vote, as in the case of a bill, as will be observed.

Thus far, that is down to the powers of Congress, the changes from the rough draft to the revised draft are as follows: The superfluous articles on the style of the government and of its consisting of legislative, executive and judiciary, and that both houses may originate bills, save for revenue, are omitted. Of the two houses of Congress the senate is now named before the house of representatives, and this is so in the clause upon the style of the laws. Qualifications of citizenship of representatives and senators are changed from three years to seven years, and from four years to nine years, respectively. Representatives and direct taxes are recoupled as in the resolutions of the convention in convention. The senate may now propose or concur with amendments of revenue bills. The president of the senate is to be the vice-president of the United States. Power to try impeachments is withdrawn from the judiciary and given to the senate. Provision for property qualifications of members of each house is omitted.

There is addition to the parliamentary rules that less than a quorum may compel attendance; two-thirds of each house may expel members; and parts of the journal requiring secrecy may be excepted from publication. The capacity of members of each house to hold other office is changed; and compensation of members by the United States, rather than by the several states, is restored. The time for the president to consider bills is enlarged from seven to ten days. The clause requiring three-fourths of each house to pass an order, resolution or vote over the executive veto is inserted. These comprise all the changes from the rough draft down to the powers of Congress.

Article 7, section 1, of the rough draft that the legislature of the United States shall have power to lay and collect taxes, duties, imposts and excises becomes in article 1, section 8, of the revised draft: The Congress may by joint ballot appoint a treasurer. They shall have power to lay and collect taxes, duties, imposts and excises: To pay the debts and provide for the common defense and general welfare of the United States. Here "Congress" replaces " legislature of the United States," and power to ap point a treasurer by ballot which was in the rough draft is to be exercised by joint ballot. Power to lay and collect taxes, duties, imposts and excises remains as in the rough draft but the clause is added, To pay the debts and provide for the common defense and general welfare of the United States. In the first edition of the Journal published in 1819 by authority of Congress by direction of the president, as has been heretofore observed the clause aforesaid To pay the debts and provide for the common defense and general welfare of the United States is printed in the revised draft as a separate and independent clause beginning with a capital "T" like all the other powers, the punctuation after the word "excises," immediately preceding, being a colon.

In the latest edition of Elliot's Debates there is after the word "excises" aforesaid no colon, but merely a comma, after which comes the clause—to pay the debts and provide for the common defense and general welfare of the United States, not as a separate and independent clause but as part of what precedes. Thus the first edition reads: The Congress may by joint ballot appoint a treasurer. They shall have power to lay and collect taxes, duties, imposts and excises:

To pay the debts and provide for the common defense and general welfare of the United States: While in the latest edition the clause reads: The Congress may by joint ballot appoint a treasurer. They shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States.

The purpose of the Confederation and Union was to provide for the common defense and general welfare, as observed. To this end at the making of the Articles of Confederation the chief requirement was to defray all charges of the war of the Revolution then going on and all other expenses. For this the treasury must be supplied and the supply must come from the members of the Union, the several states, and Article 8 of the Confederation was agreed on. By it the United States in Congress had the right and the several states had the obligation to supply the common treasury to defray all charges of war and all other expenses for the common defense or general welfare. If the treasury were supplied all charges of war and all other expenses would be defrayed and provision made for the common defense or general welfare by the concurrent action of Congress and the several states. But Congress could not lay or collect taxes but were dependent on the several states fulfilling their obligations by complying with the requisitions on them for their quotas of revenue,

by laying and collecting taxes for their quotas and contributing them to the treasury of the United States; and the several states interpreted themselves as ultimately supreme and their contributions as voluntary, whereby Congress had no right to have the treasury supplied or the charges of war or other expenses defrayed or the common defense or general welfare provided for without their consent; and the several states failing to comply with the requisitions of Congress—and in some instances refusing to comply—the United States accumulated by the end of the war a very heavy debt, the non-payment whereof and the fear of its repudiation, as the several states were repudiating theirs by depreciated currency, or otherwise, injured the credit of the United States, weakened the common defense and was contrary to the general welfare. General Washington in his Legacy in 1783 urged the payment of the debts of the United States as a foremost requirement for the general welfare. When the constitutional convention assembled in 1787 the debt was some $50,000,000 and the chief requirement for the common defense and general welfare was no longer to defray all charges of war and all other expenses, as in the Confederation, but to pay the debts of the United States.

The convention being assembled to make the constitution "adequate to the exigencies of government and the preservation of the Union" conferred on the national legislature power to fulfill the purposes of Congress by the Confederation to provide for the common defense and general welfare. This is clear in the resolutions of the convention prior to the reference to the committee of detail to draft the Constitution, that the national legislature shall have the legislative power vested in Congress by the Confederation, and moreover for the general interests of the Union, and where the separate states are incompetent or individual legislation might interrupt

the harmony of the Union, which resolution carried power as has been observed, according to the purposes of Congress by the Confederation as well as according to the precedent constitutions, the legislative power of perfect union. This power further accords with the purposes of the preamble to provide for the common defense and promote the general welfare. To this end the chief requirement being to pay the debts, the convention validated the debts of the United States by Article 6 of the Constitution, as will be observed, and having resolved that future states might be compelled to share the debts, as observed in the provision for the admission of new states, the convention further resolved that Congress should have power to pay the debts.[1] But to this end the treasury of the United States must be supplied, and the supply could only come from the members of the Union, the several states, and only by conferring on Congress power to *lay and collect* taxes, thus relieving the United States of dependence on the contributions of the several states; and taxes being of two kinds, direct taxes to the several states and indirect taxes to the several states, the former denominated direct taxes, and the latter called duties, imposts and excises, the rough draft drawn from the Pinckney draft provided that Congress shall have power to lay and collect taxes, duties, imposts and excises, and further provided the rule for direct taxes. Thereafter it was only necessary, in order to conform to the resolutions of the convention prior to the reference to committee of detail, to add power to pay the debts and provide for the common defense and general welfare of the

[1] August 18th, a grand committee was appointed on the question of assuming debts of the several states. It reported August 21st, that the Legislature of the United States should have power to fulfill the engagements of Congress and discharge as well the debts of the United States as the debts incurred by the several states during the late war for the common defense and general welfare. August 22d, this report was amended, omitting the power to discharge the debts of the several states, and adopted in the language, "The legislature shall fulfill the engagements and discharge the debts of the United States."

United States: Hence the great general power of Congress: The Congress may by joint ballot appoint a treasurer. They shall have power to lay and collect taxes, duties, imposts and excises, To pay the debts and provide for the common defense and general welfare of the United States.

The steps leading to the adoption of this clause are as follows: August 18 and 20 the rough draft being under consideration two lists of additional powers to be conferred on Congress were submitted to the convention and referred to the committee of detail which had reported the rough draft. This committee made report August 22 that certain additions and alterations be made to their previous report, that is to the rough draft, the first being: At the end of the first clause of the seventh article, add "for payment of the debts and necessary expenses of the United States," provided no law for revenue be in force more than years: another being at the end of the sixteenth clause, seventh article, add "and to provide as may become necessary from time to time for the well-managing and securing the common property and general interests of the United States in such manner as shall not interfere with the governments of individual states in matters which respect only their internal police, or for which their individual authorities may be competent." By the former addition, observe, the payment of the debts and necessary expenses of the United States would be only the *purpose* of the power to lay and collect taxes, duties, imposts, and excises. By the latter Congress would have power according to the resolution of the convention, from the Confederation, for the general interests of the United States, and power to secure the common property thereof, which was, it may be submitted, the old Northwest Territory, then the chief asset of the United States.[1] Yet this would reserve to the several states the government of their

[1] Bancroft's History of the United States.

internal police. Congress would have power for the common defense and general welfare but to the several states would be reserved the power they asserted as colonies against Great Britain on the ground that they had no representation in the government. This report from the committee of detail was postponed till August 25th. Then it was moved to add to the power of taxation of Congress the clause " for the payment of the debts and for defraying the expenses that shall be incurred for the common defense and general welfare;" but this motion passed in the negative ten states to one, thus deciding that the power to lay and collect taxes, duties, imposts and excises should not be for the *purpose* of paying the debts and defraying the expenses incurred for the common defense and general welfare. Further than this the report of committee of August 22d appears never to have been voted on. August 31 it was referred to committee to which all the provisions of the Constitution remaining undisposed of were referred, and September 4th the committee reported that the first clause of the seventh article should be amended to read as follows: The Congress may by joint ballot appoint a treasurer. They shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States. This report was at once adopted. Thus it would appear power to provide for the common defense and general welfare was adopted without the reservation to the several states of the government of their internal police.

Yet the whole might be interpreted to the Jersey plan, for power to lay and collect taxes, duties, imposts and excises might be construed to be power to direct and appoint quotas as in the Confederation, and direct their collection in non-complying states and pass acts directing the same, the quotas remain-

ing, however, the voluntary contributions of the several states; and duties, imposts and excises might be restrained to those which were incidental to the regulation of commerce among the several states and with foreign nations in good faith, as the colonies had asserted against Great Britain in the Declaration of Rights of October 14, 1774, and other papers and addresses of the Continental Congress; and as Great Britain assented to by 18 George III, ch. xii (1778) relinquishing taxation save for regulation of commerce. In that event Congress, as in the Confederation, would have no means to pay the debts or provide for the common defense or general welfare. Moreover the latter clause—to pay the debts and provide for the common defense and general welfare might be construed to be only the purpose of the power to lay and collect taxes.

The next clause of the rough draft, To regulate commerce with foreign nations and among the several states, appears in the revised draft, To regulate commerce with foreign nations among the several states and with the Indian tribes. Power to regulate commerce with the Indian tribes was in Congress by the Confederation, Article 9, where Congress had power of "regulating the trade and managing all affairs with the Indians not members of any of the states, provided the legislative right of any state within its own limits be not infringed or violated." This power had been frequently exercised: June 4, '78 Congress authorized a treaty with the Indians, and many treaties had been made with the Indians from time to time by authority of Congress. It may be observed here that powers which were separate are included in one clause. This occurred before in the rough draft where powers theretofore separate (1) to declare the law and punishment of piracies and felonies committed on the seas, and (2) the punishment of counterfeiting the coin of the

United States, and (3) offenses against the law of nations were all included in one clause. In the Pinckney draft powers theretofore separate (1) to coin money, and (2) to regulate the value of all coins, and (3) to fix the standard of weights and measures were also included in one clause. It accords with this that the first clause should contain three or four powers,—to lay and collect taxes, etc., to pay the debts, to provide for the common defense and general welfare. It will also be observed that in the revised draft the order and arrangement of the powers is altered.

The next clause of the rough draft, To establish a uniform rule of naturalization throughout the United States, becomes in the revised draft, To establish a uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States. Here also two powers are included in one clause. The latter power to establish uniform laws on the subject of bankruptcy does not appear in the Confederation nor does it appear to have been exercised by Congress. It seems to have originated in the particular necessities of the period, in connection with the troubles occasioning the prohibition against the several states coining money or making any but specie a tender in payment of debts. Mr. Madison in his introduction to his private journal of the debates in the convention says[1] "Among the defects (of the Confederation) which had been severely felt was want of uniformity in cases requiring it, as laws of naturalization and bankruptcy." The naturalization power was offered by the Jersey plan, as observed, but the bankruptcy power is perhaps the only particular power of Congress not expressly vested in or exercised by Congress by the Confederation or offered by the Jersey plan.[2]

[1] Elliot's Debates, vol. 5.

[2] This novelty of the bankruptcy provision makes its introduction of special interest, but no reason appears beyond that stated by Mr. Madison. The Journal shows that on August 29th the sixteenth article of the rough draft was taken up, reading "Full faith shall be given in each state to the acts of the

The next clause, To coin money, and the next, To regulate the value of foreign coin, and the next, To fix the standard of weights and measures, are all included in one, To coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures. The next clause, To establish post-offices, becomes, To establish post-offices and post-roads. As observed before, both these powers had been exercised by Congress. The next clause To borrow money and emit bills on the credit of the United States, becomes To borrow money on the credit of the United States, the clause "and emit bills" being stricken out, notwithstanding it was in the Confederation and was one of the most frequently exercised powers of Congress theretofore, as observed. But this power, among the powers of the several states as well as of Congress, had given occasion for the depreciated currency and upon considerable discussion, set forth in the Madison Debates, it was omitted from the *particular* powers of Congress.[1]

The next clause, To appoint a treasurer by ballot, becomes by joint ballot, as observed. The next, To constitute tribunals inferior to the supreme court,

legislatures and to the records and judicial proceedings of the courts and magistrates of every other state." This was referred to committee, together with a proposition submitted, to establish uniform laws on the subject of bankruptcies. September 1st, the committee reported in favor of both, and adding a clause — also referred to them on the same day — empowering the legislature by general laws to prescribe the manner of proof of such acts and proceedings and the effect of judgments of one state in another. September 3d the report was adopted, the vote on bankruptcy being yeas, nine states, nay, one state. The connection of these provisions seem to be: By the Confederation full faith was given to judicial proceedings, but not to acts of the legislatures of the several states, and the insertion of acts of the legislatures in the rough draft from the Pickney draft was stated in debate on the day of reference to the committee to be in order to cover acts of the legislatures on the subject of insolvency. So the committee's report and the grant of the convention of full faith in each state to acts of the legislatures of the several states was directed to acts of insolvency, and particular power was conferred on Congress to pass uniform laws upon that subject, that is on bankruptcies. Thus the bankruptcy power would appear to have been acquired in connection with the financial difficulties of the period, which occasioned so many of the provisions, beyond those appearing in the Confederation, as aforesaid.

[1] See also Fiske's Critical Period of American History.

remains as before. The next, To make rules concerning captures on land and water, is included with two others, so the whole reads: To declare war, grant letters of marque and reprisal, and to make rules concerning captures on land and water. Power to declare war was in the rough draft, as observed, in the words, To make war. The substitution of the word "declare" for "make" appears to be because making war was more an executive than a legislative function. Power to grant letters of marque and reprisal was from Confederation article 9, conferring power of "granting letters of marque and reprisal in time of peace," but providing that Congress should never "engage in war; nor grant letters of marque and reprisal in time of peace" without the assent of nine states. This power had been frequently exercised : March 27, '81 Congress passed an ordinance granting letters of marque and reprisal, and the board of admiralty was directed to prepare instructions to vessels commissioned for the purpose. And for rules concerning the same see December 4, '81, and February 26, '82; and the power appears to have been exercised at an earlier date during the war. Indeed it would seem the Confederation did not require to express this power in time of war but only in time of peace. Here also three powers were included in one clause.

The next clause, To declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offenses against the law of nations, which power had been exercised as three separate powers, as observed, is now again separated into two clauses becoming (1) To provide for the punishment of counterfeiting the securities—being mainly bills of credit, particular power to issue which was omitted, as observed—and current coin of the United States, and (2) To define and punish pi-

racies and felonies committed on the high seas and offenses against the law of nations. The next clause, To subdue a rebellion in any state on application of its legislature was omitted, being executive in nature and legislative power therefor appearing elsewhere.

The next power, To make war, has been observed. The next, To raise armies, becomes, To raise and support armies—but no appropriation of money to that use shall be for longer term than two years. Power to support as well as raise armies had been exercised during the war, of course. Limitation on the term of appropriation of money therefor is according to the British constitution, the reason assigned in debate in the convention for making the term two years here being that Congress was to be elected biennially and appropriations for only one year, might be inconvenient as there might be no session soon enough to renew them.[1] The next power To build and equip fleets, becomes To provide and maintain a navy, which had been done by Congress since 1774, as observed. The next To call forth the aid of the militia in order to execute the laws of the Union, enforce treaties, suppress insurrections and repel invasions, is so altered as to avoid executive functions, becoming power To provide for the calling forth of the militia to execute the laws of the Union, suppress insurrections and repel invasions. The last power To make all laws that shall be necessary and proper for carrying into execution the foregoing powers, etc., remains as in the rough draft.

Then some powers appear in the revised draft which were not in the rough draft. Power to promote the progress of science and the useful arts by securing for limited terms to authors and inventors the exclusive right to their respective writings and

[1] See September 5th in Madison's Debates. But this reason would scarcely appear to suffice since there was express provision in the Constitution at the time, that Congress should assemble once in each year.

discoveries: This power had been exercised by Congress, as regards authors. May 2, '83, Congress recommended to the several states to secure to authors or publishers of new books copyright of the same for a certain term, not less than fourteen years. And the power had been recently exercised in England.[1] The next clause To make rules for the government and regulation of the land and naval forces appears in the Confederation article 9, conferring power of "making rules for the government and regulation of the said land and naval forces and for directing their operations." The next To provide for organizing, arming and disciplining the militia and for governing such part of them as may be employed in the United States—reserving to the states respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress—appears in the Confederation, article 9, in part. In further part its necessity was urged by General Washington in his Legacy June '83. The Confederation provided that Congress should have power to appoint all officers of the land forces in the service of the United States, except regimental officers, and to make requisitions on the several states for their quotas of militia according to their numbers of white inhabitants, such requisitions to be binding; and thereupon the legislature of each state was to appoint regimental officers, raise, clothe, arm and equip the men, after which the forces should march to the place appointed and within the time agreed on by Congress. But the several states having neglected their obligations in this respect, General Washington in his Letter to the governors and presidents of the several states on resigning command of the army urged that there should be a uniform system of militia.[2] Power To exercise ex

[1] See, as to authors, 15 Geo. III., and as to inventors, 7 and 17 Geo. III.

[2] Bancroft's History of the United States, vol 6, pp. 83-86; Fiske's Critical Period of American History, p. 54.

clusive legislation in all cases whatsoever over such district (not exceeding ten miles) as may by cession of particular states and the acceptance of Congress become the seat of government of the United States; and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be for the erection of forts, magazines, arsenals, dockyards and other needful buildings: December 23, '84, Congress had resolved to purchase soil and build thereon a federal House for Congress and for the executive officers thereof; a house for the president of Congress; buildings for the secretaries of foreign affairs, of war, of marine, of Congress and of the officers of the treasury. October 21, '83, Congress had resolved similarly, the place selected for the said buildings being at or near the lower falls of Potomac or Georgetown, provided a suitable district on the banks of the river could be procured for a *Federal town;* and the right of soil and an *exclusive jurisdiction,* or such other as Congress might direct was to become vested in the United States therefor.[1]

Thus all the legislative powers of the revised draft appear to have had precedents in Congress and to have been vested in Congress by the Confederation, either expressly, or by construction of Congress to whom the interpretation of their powers belong, by the exercise of those powers: except those offered by the Jersey plan and put in the foreground—the power to lay and collect taxes, of regulation of commerce and of naturalization; and except the power of bankruptcy, in addition, which, *like all the others, was particularly required within the experience of Congress by the Confederation or the Continental Congress.*

[1] In the Pinckney draft, probably from prior precedent, was power to Congress: To provide such dockyards and arsenals, and erect such fortifications as may be necessary for the United States, and to exercise exclusive jurisdiction therein.

To continue the rough draft in the revised draft: article 7, section 2, of Treason, becomes article 3, section 3 of the revised draft with some change corresponding to Blackstone. The United States is still referred to in the plural number as "them" whereby the states might be considered either jointly or severally. Article 7, section 3, of direct taxation was recoupled with representation, as observed. Article 7, section 4, of the duty on exports and of the importation of slaves is article 1, section 9, paragraphs 1 and 5 but altered as to slaves to restrain any prohibition on their importation for 21 years, but allowing taxation on their importation not exceeding ten dollars per person. Article 7, section 5 of capitation taxes is article 1, section 9, paragraph 4. Article 7, section 6 of navigation acts is omitted; as the result of the compromise of the northern and southern states restraining Congress from taxing exports or prohibiting the importation of slaves for 21 years, though their importation might be taxed as aforesaid. This compromise was effected in committee: referred to committee August 22; August 24 the committee reported the compromise; and August 25 and 29 the matter was taken up and the report adopted.[1] Article 7, section 7 of titles of nobility, is article 1, section 9, paragraph 7; and paragraph 8 is added from the Confederation, article 6, paragraph 1 that no person holding office under the United States shall accept any present or title or—etc., from any foreign state.

Article 8 of the supremacy of the laws pursuant to the Constitution and of the treaties of the United States is article 6, paragraph 2 but altered by putting "Constitution" before the "laws and treaties" which arrangement was according to the order of the authority of the words, the Constitution being the supreme law. And the phrase "law of the land"

[1] Madison's Debates, August 29, and note.

was substituted for the phrase "law of the several states; in the original resolution of Congress wherefrom this article was drawn and in the Pinckney draft the phrase had been " law of the land."[1] It may also be observed that this supremacy power is no longer among the powers of Congress as it had been from the beginning, but is now arranged in the revised draft at the end of the Constitution. This was done by the committee on revision of style and arrangement. It would appear that this may leave it open to interpretation and construction to determine to whom belongs the power of interpretation and construction, to the legislative, executive or judiciary.

Article 9, section 1 that power to make treaties, appoint ambassadors and judges of the supreme court should be in the senate, the branch composed according to the federal plan as in the Confederation, was omitted, and instead it is provided that the president shall have this power by and with the advice and consent of the senate, article 2, section 2, paragraph 3. This strengthened the executive by power approaching that of the executive of Great Britain to whom the house of lords is the great council, so called, for these purposes.[2] To this strengthening of the executive the adherents of the federal plan appear to have consented on the several states being given the same voice in the election of the president by the people—by the " electoral college "—that they had acquired in Congress and his election thereby, as has been observed. The provision that to the confirmation of treaties two-thirds of the senate should be required to concur would appear to have been occasioned by the very recent and strenuous objections of the several states to the provisions of certain treaties as that with Great Britain then in force.

[1] See Journal, August 23d and 25th. The Pinckney draft also contained a power of direct negative on the several states' laws—Article XI, but the convention having rejected it, as observed, it does not appear in the rough draft of the constitution.

[2] Black. Com., book 1, chap. 5, pp. 227–8.

Article 9, sections 2 and 3 empowering the senate to determine controversies between the several states respecting jurisdiction or territory and controversies concerning lands claimed under grants from different states, as in the Confederation, is omitted and this power is included among those conferred on the judiciary, which is vested with jurisdiction of all controversies between the several states, article 3, section 2.

Article 10, section 1, of the president is article 2, section 1, paragraphs 1, 2, 3, and 4, the provisions concerning the executive being much altered and amended so that instead of his being elected by Congress for the term of seven years and ineligible a second time, his term is now four years, the ineligibility is omitted and his election is to be by a body in the nature of a Congress chosen specially for this purpose and electing by joint ballot: that is by the several states appointing electors equal in number to their numbers of members of both houses of Congress, these electors to meet and ballot for president. If no one have a majority the house of representatives should from the candidates make an election, voting however as states equally as in the senate; the election thus resting with the several states, the members of the Union, represented as in both houses of Congress in the first instance, but finally with the several states as equals as in the senate, yet by the body elected by the people. Provision for the vice-president was the same as to his term, his re-eligibility and his election. Article 10, section 2 of the powers, qualifications, etc., of the president is in article 2 section 3, and section 2, paragraphs 1 and 2, provision being added for the president's requiring opinions from the executive departments, thus recognizing the cabinet which existed in the Confederation as has been observed, similar to the privy council or cabinet of the British executive.

And appointments to offices are to be made by and with the advice and consent of the senate, but the executive may fill vacancies by commissions to expire at the end of the next session. The form of the oath of the president is added to and his qualifications prescribed, that he should be a citizen, natural born, or at the adoption of the Constitution, 35 years of age, and a resident of the United States 14 years. The grounds of removal from office of the president and of civil officers are defined to be impeachment for and conviction of treason, bribery or other high crimes or misdemeanors, and in case of the vacation of the office of president in any manner its exercise should devolve on the vice-president, thence as Congress might provide.

Article 11, sections 1 and 2 of the judicial power is article 3, section 1. Article 11, section 3 of the jurisdiction of the judiciary is article 3, section 2, paragraphs 1 and 2, omitting jurisdiction to try impeachments, conferred on the senate as observed, and inserting jurisdiction of cases arising under treaties, and controversies to which the United States should be a party, and controversies between states regarding territory or jurisdiction, and between citizens of the same State claiming land under grants of different states. Controversies between states regarding jurisdiction or territory and between citizens of the same State claiming land under grants of different states were taken from the senate as observed; controversies to which the United States should be a party and cases arising under treaties appeared in the Jersey plan though there the former extended only to disputes between the United States and an individual state respecting territory. And jurisdiction of all cases arising under the laws of the United States becomes jurisdiction of all cases in law and equity arising under the Constitution and laws of the United States, the phrase "law and

equity" being according to precedent, and the arrangement of "Constitution" before "laws" being according to the order of the authority of the words. Article 11, section 4 of jury trial is article 3, section 2, paragraph 3, adding that Congress may provide for the place of trial of crimes not committed in any state. Article 11, section 5 of the extent to which judgments in impeachment shall go is paragraph 7, section 3, article 1.

Articles 12 and 13, putting prohibitions on the several states, is article 1, section 10, adding prohibition against the states passing bills of attainder or ex post facto laws, or laws impairing the obligation of contracts. That respecting bills of attainder and ex post facto laws is in Blackstone;[1] the same prohibition is extended to Congress in the revised draft by article 1, section 9. The prohibition of laws impairing the obligation of contracts was occasioned by the laws of the several states making payment of debts in depreciated currency, as appears from the histories of the times. Prohibition against the suspension of habeas corpus by Congress, which also appeared in the revised draft, is from Blackstone.[2]

Article 14, securing the privileges and immunities of citizens of each state in the several states, is article 4, section 2, paragraph 1. Article 15 of fugitives from justice is article 4, section 2, paragraph 2; and paragraph 3 is added to article 4, section 2, providing for the delivering up of escaped slaves. This power finds its origin in the Confederation, article 4, authorizing the "removal of property imported into any state from any other state of which the owner is an inhabitant." Article 16 respecting the faith to be given in each state to the public acts, records and judicial proceedings of the several states, is article 4, section 1 adding that Congress may by general laws provide the manner of proof of such acts and

[1] Book 4, chap. 19, p. 259; Introd., sec. 2, p. 46.
[2] Book 1, chap. 1, p. 136.

the effect thereof. It was observed in convention that unless Congress prescribed the effect of such acts and proceedings the provision would be no more than takes place regardless of it among independent nations, which observation appears likely to have supplied the reason of the provision. Article 17 of the admission of new states is article 4, section 3, paragraph 1 with some changes. The phrase "within the limits of the United States" is omitted and instead it is declared that new states may be admitted by Congress "into this Union." But it may be submitted that the "Union" implies its limits whatever they may be interpreted to be. Provision is added that no state shall be formed by the junction of two or more states, or parts of states, without the consent of such states; and the clauses that admission of new states be on the same terms as the original states, except as to conditions concerning the public debt—as also that requiring the consent of two-thirds present in each house to admission—is omitted; thus leaving it open to interpretation whether the admission of new states may be subject to conditions other than those imposed upon the original states; but the original states are assured their territorial integrity. Then a new provision is added that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in the Constitution shall be so construed as to prejudice any claim of the United States, or of any particular state. This power over the territory of the United States had already been exercised by Congress by the ordinance of 1787.

Article 18 of the guaranty of the United States to each state is article 4, section 4, adding that application for protection may be by the executive as well as the legislative. Article 19 of amending the Constitution is article 5, adding that the Constitution may be amended whenever two-thirds of both houses

of Congress shall deem necessary—as well as on application of two-thirds of the legislatures of the several states; and that amendments shall be valid when ratified by the legislatures or conventions of three-fourths of the several states—excepting, however, that no amendment for 21 years shall effect —— article, —— section. Article 20 respecting the oaths of officers of the United States and the several states is article 6, paragraph 3, adding that no religious test shall ever be required.[1]

Article 21 is article 7 providing that the ratification of the conventions of nine states be sufficient for the establishment of the Constitution between the states ratifying. Nine states appears to have meant the certain majority of the people of the United States as has been observed. And nine states being between two-thirds and three-fourths of thirteen states, it may be that amendments by two-thirds and three-fourths of the states was taken to mean amendments by a certain majority of the people of the United States. It is evident repeatedly in the debates that nine states was taken to mean a certain majority of the people of the Union.

Article 22 on the same is omitted. So is article 23. Article 6, paragraph 1 of the revised draft that all debts contracted and engagements entered into prior thereto be valid, is according to article 12 of the Confederation.

The following appear to be the alterations from the rough draft to the revised draft subsequent to the legislative powers: That respecting treason; and respecting exports and the importation of slaves. The navigation act provision was omitted. Power to make treaties, appoint ambassadors and judges was withdrawn from the senate and conferred on the president by and with the advice and consent of the senate, and the same advice and consent was required

[1] See Black. Com., book 4, chap. 4. Freedom from religious tests was, of course, one of the great objects of the colonies in their previous history.

to appoint officers of the United States. Certain controversies between states and between citizens of the same state, from the Confederation, are transferred from the senate to the judiciary. The term of the president becomes four years, he is no longer ineligible again, and the "electoral college" is established. The same appears for the vice-president. There are amendments to the president's powers and qualifications, the cabinet is recognized and provision made for the succession upon vacancy in the office of president. The trial of impeachments is transferred from the judiciary to the senate. Trial by jury outside of the several states is provided for. Prohibition against bills of attainder and ex post facto laws by Congress or the several states, and against laws impairing the obligation of contracts by the several states is inserted. Provision respecting escaped slaves is inserted. Alteration is made in the provision for new states, and provision is added for the government of the territories. Ratification of the Constitution is to be by nine states and future amendments by two-thirds and three-fourths of the states. Prohibition against religious tests for office is inserted.

Of all the changes from the rough draft appearing in the revised draft perhaps these are the leading ones: In requiring more years of citizenship as a qualification for senators and representatives. In the power of the senate to amend revenue bills; and their power to try impeachments, withdrawn from the judiciary. Power of the executive instead of the senate to make treaties and appoint ambassadors and judges, but by and with the advice and consent of the senate; that advice and consent being also added in the appointment to offices by the executive. The election of the president by the special body composed like Congress, rather than by Congress, with the term of office reduced from seven years to four

years, but with re-eligibility. The institution of the vice-presidency for the sucession to the presidency. The transfer to the judiciary of the controversies between states and under grants from different states which in the rough draft were given to the senate from the Pinckney draft, having belonged by the Confederation to Congress. The reservation to the original states of their territorial integrity, with the omission of the assurance to new states of their admission on equal terms with the original states. Provision for the government of the territories; and for the ratification of, and for amendments to the Constitution. All appear according to the national plan yet interpretable to the federal plan. Precedent does not appear to have been so closely followed by the convention in the later period of their existence yet in most cases it was adhered to. For the leading innovation in the election of the president there was some precedent in the constitution of the state of Maryland where there was election by electors chosen by the people as here established for the presidency, but there it was election for the senate.

FROM THE REVISED DRAFT TO THE SIGNING OF THE CONSTITUTION.

During the four days which elapsed—only three days leaving out Sunday—between the report of the revised draft to the convention and the day of the signing of the completed instrument there were but few changes: The ratio of representation was altered from one to 40,000 inhabitants to one to 30,000 inhabitants. Instruction was inserted to the several state legislatures to fill vacancies in the senate. The place of choosing senators was excepted from the regulation of Congress over the choosing senators and representatives, as the place of choosing senators would be the capital city of each state; this exception occurred in the Pinckney draft. The clause prescribing the enacting style of laws was omitted as superfluous. Provision that every order, resolution or vote should be passed over the executive veto by three-fourths of each house was altered to two-thirds as in the cases of bills, thus rendering the provision virtually nugatory. Power of Congress by joint ballot to appoint a treasurer was omitted as being executive in nature. After the power of Congress to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States, was added "but all duties, imposts and excises shall be uniform throughout the United States. This rule of *uniformity* for duties extending throughout the constituent bodies collectively, the principal forms whereof were stamp-duties, imposts and excises, as observed, was the rule in Great Britain and thence in the several colonies and the several states.[1]

[1] See authorities cited on direct taxes, duties, imposts and excises.

The clause that no capitation tax be laid except according to the census was changed to read that no capitation "or other direct" tax be laid except according to the census "or enumeration" aforesaid, thus confirming the rule of direct taxation to the several states, capitation taxes being direct taxes as has been observed. After prohibition of the taxation of exports, provision was made against discrimination among the several states by preferences in the regu lation of commerce; and after the provision for drawing money from the treasury only by appropriation it was added that statements of accounts of public moneys should be published periodically. From the prohibition on the states' laying import or export duties were excepted such duties for the purpose of executing inspection laws, the net produce thereof to be to the treasury of the United States, and such laws to be subject to revision and control by Congress; and it was added that no state should lay any duty on tonnage without consent of Congress. Where the executive had power to appoint officers of the United States by and with the advice and consent of the senate it was conditioned that Congress might by law vest the appointment of such inferior officers as they should deem proper in the president alone, in the courts of law or in the heads of departments. The chief executive was prohibited from receiving any other emolument than his fixed compensation, from the United States or any of them. Finally provision was added to the article on amending the Constitution that no state should without its consent be deprived of equal suffrage in the senate, thus further assuring the equality of power of the original states as their integrity of territory had been assured in the provision for new states, as observed. On September 15, which was practically the last working day of the convention, the Journal shows two motions made to preserve to the several states their

internal police in connection with their equality of suffrage in the senate, but the motions passed in the negative both times. In the article on amendments also, the blanks left in the revised draft were filled in so that no amendment for 21 years should affect the restraints on Congress concerning capitation taxes and the importation of slaves. Thus were preserved the privileges of slavery along with the privileges of the original states in the senate, in the article on amendments.

Further in that article it was provided that on the application of the legislatures of two-thirds of the states for amending the Constitution Congress should, instead of themselves proposing the amendments, call conventions for the purpose, so that amendments originating outside of Congress would be made as was the Constitution, in convention chosen for that purpose, rather than by Congress as was the Confederation. Yet two-thirds of Congress could also propose amendments which should be valid when ratified by three-fourths of the several legislatures, as observed. Amendments would be by the states jointly and severally, they being represented jointly by Congress or by a convention for the purpose, and severally by the state legislatures; two-thirds and three-fourths of the states jointly and severally approximating, it would appear, a certain majority of the people of the United States.

FROM SEPTEMBER 1774 THROUGH SEPTEMBER 1787.

The several colonies were members of the United Kingdom of Great Britain and the government thereof seeking to levy taxes on them, both severally and jointly, directly and indirectly, and asserting the right to bind them by all laws whatsoever, they denied both unless they should have representation in Parliament, which would have put them on equal footing with the constituent bodies of England having representation in Parliament. Being denied this they formed a new union of America, therein acquiring the representation denied them in Great Britain, which representation in the Union of America with the right of self government in their separate affairs constituted them states when they should become known to the law. July 4, '76, the new Union assumed to be the United States of America and by the representatives of the United States of America in general Congress assembled declared the United Colonies to be free and independent states absolved from allegiance to Great Britain, and having full power to levy war, conclude peace, etc., and do all other acts which independent states may do. Thus the states arose jointly and severally by their joint act, and Congress representing the Union of America levied war and provided for the common defense and general welfare during the Revolution, and levied direct taxes on the several states therefor, according to their numbers including all the slaves.

Meanwhile, prior to the Declaration the government of the states jointly and severally was projected, by Congress resolving that the exercise of every kind of authority under the crown should be

suppressed and all the powers of government exerted under the authority of the people of the Colonies, thus abolishing monarchy and instituting a Republic; and by Congress recommending to the several Colonies to adopt such governments as in the opinion of the representatives of the people should best conduce to the safety and happiness of their constituents in particular and America in general, whereby the several governments would be established by the representatives of the people severally but by authority of the people jointly, and for the people both severally and jointly. Prior to the Declaration also, Congress appointed a committee to draft articles of Confederation and perpetual Union to be made by Congress and ratified by the several legislatures for the common defense and general welfare, whereby the government of the Union would be by the representatives of the people jointly, ratified and confirmed by them severally, and for the people jointly and severally; so that both the joint and several governments of the people would be both by and for the states jointly and severally.[1]

Thus the matter stood harmonious at the Declaration from the foresight of Congress, and here appeared the conception quoted afterwards so often in the constitutional convention likening the United States and the several states and their citizens to a planetary system where one body controls many smaller bodies each of which controls many still smaller in their orbits; and the application to the Union of many members of America, as to the several states of many members, of the motto—*E pluribus Unum*.[2]

[1] The saying of President Lincoln of "government of the people, for the people, and by the people," appears true and illustrative of the governments joint and several, for the governments of the United States and the several states are governments of the people jointly and severally, every government being both by and for the people jointly and severally.

[2] Of this harmony Mr. Wilson said in the constitutional convention; "Among the first sentiments expressed in the first Congress one was that Vir-

The name The Articles of Confederation and Perpetual Union signifies a double sovereignty of the states severally and jointly, and it was declared in Congress repeatedly—even in the same instrument—of the United States and of the several states, that they were free sovereign and independent; meaning no doubt so far as the conception was carried out—which by reason of the harmony in the face of Great Britain it was not always—that they were sovereign for their joint and separate purposes. According to this is the leading principle of the Articles, the principle of legislation by Congress and execution and administration by the several states, which was no doubt drawn from political philosophy, having been thus stated since: "The authority which is most conversant with principles should be supreme over principles, while that which is most competent in details should have details left to it. The principal business of the central authority should be to give instruction, of the local authority to apply it. Power may be localized, but knowledge to be most useful must be centralized."[1] Thus Congress would instruct and the several states apply; legislative power belonging to the one, administrative and executive power to the other.

The purposes of the Confederation and Union are stated to be common defense, mutual and general welfare and security of liberty. The purposes of Congress are the general interests of the Union, the common defense and general welfare, and therefor all charges of war and other expenses were to be defrayed out of the common treasury to be supplied by the several states, and they were pledged to abide by the determination of Congress on all matters submitted to that body.

ginia is no more, that Massachusetts is no more, that Pennsylvania is no more, etc.; we are one nation of brethren; we must bury all local interests and distinctions. This language continued for some time. The tables at length began to turn." June 8; Madison's Debates.

[1] From John Stuart Mill.

If the harmony of the period of the Declaration had been perpetuated and the several states had continued to abide by the determination of Congress to supply the common treasury the charges of war and all other expenses would have been defrayed and the common defense and general welfare provided for by the legislation of Congress and the execution and administration of the several states. The power of Congress was interpreted to be power for the general interests of the Union or for the common defense and general welfare—in law although not in fact observed,—as witness the argument of Mr. Wilson in the matter of the Bank of North America ordained by Congress by authority of the Confederation, as well as the liberal interpretation of Congress of their own powers all during the Confederation: and Congress seeking to preserve the harmony used language of recommendation and request to the several states according to the practice adopted before the Articles were made and ratified.[1] The Journal of Congress during the Confederation is filled with communications between the United States and the several states, recommendations and directions of Congress to the latter, accounts concerning quotas of revenue and of troops required from the several states.

In so far as the Confederation and Union was not interpreted or made to confer on Congress power to provide for the common defense and general welfare the reason would appear to be as follows: While the several state constitutions were drawn on the recommendation and direction of Congress immediately from the several colonial charters the Articles of Confederation and Perpetual Union were sixteen months in the making; from prior to the Declaration to the middle of November, '77, after the surrender of Burgoyne and the end of the campaign around

[1] And according, also, to the law of precatory trusts, which also arose out of non-obligatory recommendations and requests afterward made binding—thus occasioning the origin of the practice, it may be.

Saratoga brought independence of Great Britain into sight as matter of fact. As the fear of Great Britain subsided the ambition and jealousy of the several states arose, the necessity for perfect union which had been recognized prior to the Declaration appeared to decline, and the ancient habit of the people rendering allegiance to the several state governments they conceived themselves in the same attitude against the Union that they had occupied against Great Britain, notwithstanding their representation in the Union. They conceived they were not to be interfered with in their internal police or to be taxed without the absolute consent of their several legislatures; and this view led to that of their separate independent sovereignty as absolute, rather than as qualified and restrained to their independent or local purposes. From this it followed that the Union was derived from their separate powers and was but their common agent, the representatives in Congress being their representatives, the representatives of the several states instead of the representatives of the United States as expressed in the Declaration of Independence. Accordingly the determinations of Congress would be ultimately reviewable by the several legislatures, to be interpreted, administered and executed at their will and pleasure. So the several states by interpretation restricted the powers of Congress and neglected to execute them, and the ancient habit of the people permitting the subordination of the conception of Union to that of Confederation, the last words of the Articles were frequently dropped and they were no longer considered as Articles of Perpetual Union, as well as of Confederation, but as of Confederation alone; and though by the advocates of Union they were sometimes called Articles of Union, as appears in the constitutional convention in the Virginia plan, the resolutions of the committee of the whole

and in convention, those advocates were so few, and so little did they impress the histories of the day that the phrase "articles of union" comes from the records with a strange sound.

Thus government by the Articles of Confederation, as they are always called—though looked at from the side of the future they were better called the articles of Union—failed for want of interpretation and construction as a sovereign power and independent nation, and for lack of faculty to coerce the several states, its members, to execute and administer its powers, or to execute or administer them itself. It required to coerce their agency, or renounce it by acquiring its own faculties of execution and administration, and then construe its frame of government, not as a frame within which to confine it, but as a frame or skeleton whereon to grow So in the constitutional convention it was at once resolved that the government should consist of supreme legislative, judiciary and executive and later it was resolved that the legislature would have one general power of perfect union according to the purposes of Congress by the Confederation and the legislative power of precedent constitutions. That the Jersey plan offered the judiciary and the executive powers in such measure as it did, offering the executive general power to execute the laws, and never strenuously contesting the judicial general power over all cases in law and equity arising under the Constitution and laws, exhibits the necessity of conferring those powers on the Union to have been well proven, and that, restrained by the legislative, they were little feared by the several states.

But if the United States government was to have judicial and executive power, the legislation of Congress could no more be disregarded by the several states and it followed that in order to withhold the supremacy of the United States the several states must *enter Congress* and there oppose and negative

legislation inimical to the several states, and therein construe the government to the federal plan. This explains why the adherents of the Jersey plan concurred so readily with the advocates of Union in changing Congress from one to two houses, while standing out strongly for choice of members of one house by the several legislatures voting as equals; and later insisting on the senate having power to propose and concur with amendments on revenue bills—all to contest the supremacy of the United States in legislation and construe the government to the federal plan.

On the side of Union the government being strengthened by the addition of judiciary and executive to administer and execute the powers of Congress, and the same requiring to be interpreted according to the purposes of Congress by the Confederation and Union, according to the precedent constitution, it appears natural enough for the convention to have proceeded throughout according to those constitutions; for in their first and second sessions the Continental Congress had asserted again and again the right of the people of America to the British constitution,[1] which finally was renounced only by reason of its violation by the abuses and usurpations of the personal government of George III. And monarchy and nobility having been abolished and a republic established by authority of the people, it only remained to turn the parts of the British constitution end for end, which was done by the Virginia plan naming the popular branch of the legislative first, and continued in the resolutions of the committee of the whole and in convention—though afterward the order was reversed and the senate named before the house of representatives, according to the precedents—and then derive the second branch of the legislative, which had represented the

[1] See December 6, '75. Declaration of the Colonies on the King's Proclamation of August 23, '74.

nobility, from the people; and also the executive, whose authority, however, should perhaps—like his term—be curtailed, judging by the experience of the crown and the crown governors. Such government would have the strength which in the face of Great Britain was not required, by reason of the harmony then prevailing, which led to dependence on the several states for executing and administering the power of Congress.

Thus it came about that the advocates of Union, for lack of precedent in the composition of the second branch of the legislature, were divided thereupon—as witness the difference between the Virginia plan and the Pinckney draft thereon—and the composition of this branch became the focus of opposition of the several states, seeking means to contest the control of the government and its interpretation to their purposes. Prior to the attainment of the compromise on this point, out of the earnest purposes of the members of the convention the feeling became intense, and the situation such, as Mr. Madison says led to serious anxiety for the result of the convention. Here occurred a suggestion which in the light of the allegiance the several states obtained in subsequent history, appears singular enough. Adherents of the Jersey plan suggested, and the suggestion would appear to have been in the nature of an offer, to throw the several states into hotchpot, wiping out state lines altogether, and then to re-divide the territory of the United States into as many equal portions as there were states.[1] Blackstone speaks of the ancient divisions of England having been abrogated by the re-division of the kingdom into its counties, in the time of King Alfred—who also instituted uniform laws to be observed throughout the kingdom, which work was afterward carried to completion—and this precedent, in Blackstone, could scarcely have es-

[1] Madison's Debates, June 9 and 16.

caped the notice of those reviving the project now. Again there was at this period—as well as at other times—considerable discussion and advocacy of abolishing the several state governments altogether and establishing one general system for the entire country. These incidents are sufficient to illustrate that to conceive the instrument as it came from the convention requires considerable divestiture of customary prepossessions. It may be there is no better measure of how profoundly the convention was stirred in this crisis than the emotional address of Dr. Franklin, then 81 years of age, the patriarch of the convention, wherein he said that he had lived, sir, a long time, and the longer he lived, the more convincing proof he saw of the truth—that God governs in the affairs of men; and he moved for prayers.

After the compromise the powers, the United States and the several states, knew their relative strength and proceedings went smoothly, being interpretable to the purposes of all, for the composition of the second branch of the legislature according to the federal plan, not only afforded the several states an opportunity to realize their supremacy and interpret the government according thereto, but was also interpretable as merely granting to the several states in the second branch the ancient privileges enjoyed by the nobility in England, and, in imitation thereof, still belonging to members of the upper house in the several state legislatures.

Accordingly, it appearing later that the executive should not depend on Congress for his election, the "electoral college" adopted for the purpose, was composed like Congress with similar privileges to the several states in his election and similar opportunity to control the government by the executive; and the jealousy of the executive power exhibited by the Jersey plan appears to have been allayed, as its adherents concurred, apparently, in conferring on the

president by and with the advice and consent of the senate, the great powers of making treaties, appointing ambassadors and judges, which in the Pinckney draft had been left to the senate alone—according to British precedents. Yet a single executive with such power it was, that withheld some of the signatures of members.

The national plan having conferred on the legislative one general power, and the Jersey plan several particular powers, it being the same with regard to the judicial power, but both agreeing in conferring on the executive general executive power—the Jersey plan's objection to the executive having been to the executive negative—the Constitution included both plans, whereby while the several states controlled the government as they had during the Confederation, legislative power would be interpreted as several particular powers, the general power being but the purpose of Congress, or being a general power merely introductory to the succeeding particular powers—as will appear; but when the government should pass in fact to the Union Congress might exercise general power to provide for the common defense and general welfare of the United States. Likewise judicial power might be interpreted as several particular powers, the general power being but introductory to them, yet interpretable as general power, as occasion arose by the government passing to the Union: After which the several particular powers, judicial or legislative, would be superfluous. Executive power would always be general according to both plans. Notwithstanding this, however, the several states endeavored successively to obtain express reservation of their internal police —twice at the end of the convention in connection with their equality of suffrage in the senate, in article 5 on amendments, as observed.

That the convention sought harmony such as had prevailed against Great Britain is shown in the great number of resolutions passed without dissent, by the expressions in debate and the display made afterward of the unanimity of the convention in signing the Constitution,—all brought about by the requirements of the period and the preservation of the Union. Of this harmony Mr. Madison speaks thus, at the end of his introduction to his private journal of the debates in the convention: "But whatever may be the judgment pronounced on the competency of the architects of the Constitution, or whatever may be the destiny of the edifice proposed by them, I feel it a duty to express my profound and solemn conviction, derived from my intimate opportunity of observing and appreciating the views of the convention, collectively and individually, that there never was an assemblage of men, charged with a great and arduous trust, who were more pure in their motives, or more exclusively or anxiously devoted to the object committed to them, than were the members of the Federal Convention of 1787 to the object of devising and proposing a constitutional system which should best supply the defects of that which it was to replace and best secure the permanent liberty and happiness of their country." Mr. Madison says the Jersey plan was "concerted"[1] among the deputations from Connecticut, New Jersey, &c., or members thereof; and assuming this to be true, the pursuance of the Virginia plan in the resolutions of the convention in committee and again in convention, and the following of the Pinckney draft submitted with the Virginia plan in the rough draft of the Constitution, conforming it to the resolutions of the convention, with so few changes, down to the revision of the style and arrangement of the articles agreed to, in committee, and thereafter—the whole derived from

[1] His Debates, June 15th, note.

the Confederation and Union, and according with the constitutions of Great Britain and the several states in substance and in form, yet interpretable to the Jersey plan, supply accumulated and multiplied evidence that if nothing was concerted besides the Jersey plan, yet the members were led to act with great concord, when their proceedings are viewed after the lapse of a century. But, however, the powers, the United States and the several states, which had dwelt apart each within its own government were locked up in one government thenceforth, to settle the question of supremacy, and the freedom permitted to interpret the government either way is shown by the making of the compromises in committees, no record of whose proceedings were preserved. The instrument was arranged in the order preserved through the convention, consideration being given in the first article to the legislative, in the second article to the executive and to the judiciary in the third article, which order was according to the Pinckney draft and the several state constitutions. Article 4 considers the several states. Article 5 amendments; article 6 is miscellaneous; and article 7 the ratification.

OF THE INTERPRETATION.

Being established, the Constitution was considered by all the powers as a frame of government, but for the several states it was a frame within which to restrain and confine the government by the strict rule of agency as the common agent of the several states, while for the Union it was a frame or skeleton whereon the government of sovereign power fashioned on the principles of the race was to grow. That the political party of the national plan in the convention took the name Federalist is evidence of how far the convention was ahead of the country, and that the latter was not yet consolidated enough for the former name, which perhaps continued to be the fact until the appearance of that name in the National Republican party. But the Federal party interpreted the government as national rather than as federal as the name was known to the Jersey plan. The government was called a federal republic, or a federal empire by Mr. Hamilton, to whom the adoption of the name Federal as a party name may perhaps be traced, from the collection of essays by that name. By consent of that party no doubt, the Journal came to be called the Journal of the Federal Convention. But when President Washington was inaugurated it was with the acclaim *Long live* President Washington, first president of the United States—after the English custom. The alien and sedition laws proceeding from the Federal party, were pursuant to similar ones enacted by the British Parliament on the occasion of troubles with the French Directory, and occasioned the Virginia and Kentucky Resolutions, approaching the extreme theory of the ultimate supremacy of the several

states; and brought about the defeat of the Federal party and the inauguration of the Republican party, so-called it would seem in opposition to the imperialistic tendencies of the Federal party, shown in the alien and sedition laws.

But from the time of the ascendency of the Federalist party it may be observed how the Journal of Congress was changed, and took on the aspect preserved since. Direct communication between the United States and the several states' governments, which had filled the pages formerly, was at an end. The national power having the control of the government, and the execution and administration of its own powers, avoided and ignored the several state governments as the latter had disregarded the resolutions of the old Congress. The several states were dealt with collectively, indirectly, preferably, or if they were dealt with directly as in case of direct taxes, these were laid and collected by authority of Congress directly from the inhabitants of the several states into the treasury of the United States, still ignoring the governments of the several states. This practice serves to explain the omission of a clause in the Pinckney draft, from the executive power of Congress by the Confederation, a clause conferring express power on the president to correspond with the chief executives of the several states.

OF THE POWER OF CONGRESS.

Of the interpretation of the power of Congress it is most important to observe that the Constitution had conferred on Congress all the particular powers which at that period were required to provide for the common defense and general welfare; all then required to apply the principle of general and local self-government; all vested in Congress by the Confederation, and moreover for the general interests of

the Union, and where the separate states were incompetent or their individual legislation might interrupt the harmony of the Union; that is all the particular powers required to conform to precedent constitutions, and for perfect union *at that time*. Therefore there was no occasion for the exercise of the general power of Congress and the interpretation that Congress had only enumerated and particular powers was satisfactory for all practical purposes at that time. Yet two interpretations appeared, one that Congress had power to pay the debts and provide for the common defense and general welfare, the other that the power of Congress to lay and collect taxes, duties, imposts and excises was only for the purpose of, or in order to pay the debts and provide for the common defense and general welfare. Still another interpretation is mentioned, that the clause in question was a general power but intended as merely introductory to what followed, as if Congress should have power to pay the debts and provide for the common defense and general welfare, to wit:—the following particular powers.[1] These are all set out in Story on the Constitution[2] wherein many opinions of members of the convention are cited that the first interpretation is correct, among them that of Mr. Wilson in his Law Lectures;[3] and it is recited that Mr. Jefferson claimed that the first interpretation was the opinion of the Federal party while the second was that of his own, the Republican party; but it is concluded to adopt the second interpretation as that of

[1] Kent's Commentaries say: Congress are authorized to provide for the common defense and general welfare, and for that purpose, among other express grants, they are authorized to lay and collect taxes, duties, imposts and excises; to borrow money, etc.; to regulate commerce, etc.; . . . and it is concluded that the powers of Congress are not disproportionate to the magnitude of the trust confided to the Union, and which the Union alone was competent to fulfill. (1 Kent's Com., 250, 251; star page 236, 237, 238.)

[2] Book 3, chap. 14; particularly sections 907, 908, 909, 912.

[3] It is stated that Mr. George Mason, one of the members of the convention inclined to the several states, admitted Congress to have general power to provide for the common defense and general welfare, and said he wanted a clause enacted that all powers not granted are retained by the several states, or

the generally received *sense of the nation*, and also for the reason that to adopt the first would render the succeeding particular powers unnecessary and superfluous. This reason is made by Mr. Madison in the Federalist,[1] and while true in fact, it may be submitted to be untrue in law; for it being of the essence of the compromise to frame the government for both interpretations—or else the composing one legislative branch according to the federal plan and the other according to the national plan would be to no purpose—it contains both alternatives; and Mr. Madison merely advocated the one which allayed the apprehensions of the several states, and which was sufficient for the period, and closed the door to any abuse of the power of Congress, but at the cost of the requirements of the future. Had the judiciary been feared by the several states as was the legislative, a similar interpretation applied to its power, interpreting the power extending to all cases arising under the Constitution and laws as merely introductory to or declaratory of the succeeding particular powers, might have restricted it also to its particular powers. But the judiciary had only recently been made independent of the legislative and executive by making their term of office during good behavior with fixed compensation undiminishable during their term, and there was no occasion for confining their jurisdiction; and the interpretation of judicial power extending to all cases in law and equity aris-

the power for general welfare might be expanded and perverted to its destruction. Such a clause appears among the recommendations for amendments to the Constitution made by the several states in their ratifications, and accordingly, in the Ninth Amendment providing that the enumeration of certain rights shall not be interpreted to deny or disparage others retained by the people, the enumeration would include the general power of Congress. Then, too, the enumeration may refer particularly to the powers *prohibited* to Congress; of which there is evidence. As to the apprehensions of the several states concerning the expansion and perversion of the general power of Congress, it may be observed, according to the leading authority heretofore quoted from, that the British Parliament cannot of *constitutional right and power* but only by abuse thereof disregard the principle of local self-government; and the permanent existence of local self-government is a constitutional right always to be implied. (Cooley's Constitutional Law, pp, 175-76; 358.)

[1] No. 41, at the latter end.

ing under the Constitution and laws as general power, did render the succeeding particular powers unimportant and unnecessary. But other provisions of the Constitution became obsolete in practice, as for example the clause declaring how many members the several states should have in the house of representatives at first, and that validating the debts and engagements of the Confederation; that providing the president might be a citizen at the time of the adoption of the Constitution, as well as natural-born; all the provisions on slavery; and the clause on passing "every order, resolution, or vote" was unimportant from the outset. Had Mr. Madison's apprehensions of the general government been greater he might have so read the first clause of the power of Congress as to have restrained taxation to what was incidental to the regulation of commerce in good faith, and so have divested the legislative of all power over the several states as effectually as the several colonies deprived the British government. But at that period Mr. Madison was not so strict a constructionist as he became later.

The fact that the assertion that the Federal party believed in the general power of Congress was recited in Story on the Constitution to have been made not by that party but by the opposition, may evidence that the claim was not a popular or practicable one, which is sufficient to account for its not being put forth more prominently by the Federal party. The advanced stand of some members of that party may be to their credit with posterity, for whom according to the preamble the instrument was ordained and established, as well as for the then present people of the United States: for Story on the Constitution is authority that the interpretation confining Congress to particular powers was not merely that of the several states, but was the generally received sense of the nation of that day. In McCulloch v. Maryland[1] it was said by Chief Justice Marshall,

[1] 4 Wheaton, U. S., pp. 316, 405.

"This government is acknowledged by all to be one of enumerated powers." This has been accepted ever since as authority that the government is one of enumerated and particular powers. And no doubt the government is one of enumerated powers, and also particular powers, the question being whether among those powers, in addition to the particular powers, there is not one general power to provide for the common defense and general welfare of the United States.

DIRECT TAXES.

Of the interpretation of direct taxes: March 20, '83 the Journal of Congress by the Confederation shows a motion by Mr. Hamilton seconded by Mr. Wilson that the several states be advised to ratify laws for vesting in Congress authority to lay and collect the following: an import duty of five per cent., a duty on prizes of five per cent., a tax on lands at a stated rate, and a tax on houses; but the amount of the tax on lands and houses was to be credited to the several states wherein it should be assessed, while the duties were to be passed to the general credit of the United States. Here, observe, appears the division into taxes and duties which prevailed in England: the taxes are on lands and houses, the subjects of direct taxes in England, and are credited to the several states wherein collected, as to the several counties in England, thus being direct taxes on the several states, as on the several counties there; while duties are on imports and prizes, and pass to the general credit of the United States instead of to the several states, thus extending throughout the United States, all of which corresponds to the practice regarding duties in England.

Again July 13 in the convention a motion to raise all money for supplying the treasury of the United States by direct taxes, prior to the first census, from

the several states, was passed in the affirmative, though a motion to raise the same by assessment on the inhabitants of the several states was lost; thus leaving it open to interpretation whether the laying and collecting of direct taxes prior to the first census should be by authority of Congress or the several states.

In "the carriage-tax case," so-called,[1] decided in 1796, arising under act of June 5, 1794, which laid a duty extending throughout the United States on carriages, the Supreme Court held the duty not objectionable to the Constitution because there was no apportionment, and speak of direct taxes as land-taxes, capitation taxes, poll-taxes, which, as observed, are the forms direct taxes to the component members have always taken, and which were, to large extent, familiar in the Confederation. It would appear here that expediency checked definition of direct taxes, the subject being too delicate for unnecessary perspicuity. The several states would have confined taxes throughout the Union to the particular forms already dwelt on, duties on imports, excises, and perhaps stamp duties, though the latter had not been in exercise since 1765, in the Colonies, which would seem to account for taxes being so often divided into external and internal taxes, according to the customary forms.

So with the acts of Congress for direct taxes. All the early acts, those of July 14, 1798, August 2, 1813, January 9, 1815, March 15, 1816, concurred in providing that a "direct tax of" (stating the amount, as $2,000,000 in the act of 1798) "be laid upon the United States and apportioned to the states respectively in the manner following:" New Hampshire so much, etc. The act of 1816 also included a direct tax on the District of Columbia. But these acts differ: that of 1798 being in President Washington's administration, follows the view of perfect union, while

[1] Hylton v. The United States, 3 Dallas, p. 171.

those later in President Madison's administration, follow the several states' governments; the act of 1798 providing for assessing the quotas of the states on dwelling houses, lands and slaves, according to their valuation, and for collection by internal revenue collectors of the United States, each state being debited with its quota and credited on collection coming in. Here Congress lays the amount on the United States and apportions it to the several states, administering the quotas to their inhabitants upon the subject matter usual in such taxes. But the act of 1813 instead of proceeding to administer the taxes by assessing and collecting the quotas "payable by the states"—as the act says—reapportions the quotas on the counties and districts of the states, and further provides that the state legislatures may vary the quotas of the counties to suit themselves. Here the administration of the taxes to the inhabitants is left to the several states, and the word 'direct" not applying to the administration the states might have claimed that Congress had power only to direct and appoint the tax, as in the Confederation, and that quotas were but voluntary contributions of the states to the Union.

The language of the debates in the constitutional convention and in the state conventions ratifying the constitution, bears this out, all speaking of direct taxes as land-taxes, capitation-taxes, poll-taxes, some or all of these. So with the amendments proposed to the Constitution by the several states, Massachusetts, South Carolina, New Hampshire, New York, Rhode Island, that requisitions should precede the laying and collecting of direct taxes, that is that the United States should collect only in non-complying states, according to the Jersey plan.

Everything on direct taxes seems to bear this out until we come to the "income tax cases" so-called,[1] arising under the act of Congress of August 15, 1894,

[1] Pollock v. The Farmers' Loan and Trust Co., 157 U. S., 429; 158 U. S., 601,

which laid taxes or duties extending throughout the United States on certain incomes. Here the Supreme Court held direct taxes to include taxes on real and personal property and incomes therefrom, and that the income tax was unconstitutional because not apportioned among the states according to numbers, and the court interpreted the direct taxes clause thus:[1] speaking of taxes on real and personal property and incomes the Court say: "Being direct, therefore, and to be laid by apportionment, is there any real difficulty in so doing? Cannot Congress, if the necessity exist of raising thirty or forty or any other number of million dollars for the support of the government in addition to the revenue from duties, imposts and excises, apportion *the quota of each state* upon the basis of the census, and thus advise it of the payment which must be made and proceed to assess that amount on all the real and personal property and the incomes of all persons in the state, and collect the same if the state does not, in the meantime, assume to pay *its quota* and collect the amount according to its own system and in its own way? Cannot Congress do this as respects either or all of these subjects of taxation, and deal with each in such a manner as may be deemed expedient, as, indeed, was done in the Act of July 14, 1798? [2]

Here the Court interpreted the matter so as to make it turn on the rule or measure of quotas rather than on the right to quotas; and say the purpose of the clause was to limit direct taxes to numbers in order to "prevent an attack on accumulated wealth by mere force of numbers."[3] But the rule of numbers came from the old Continental Congress, from the old Articles of Confederation of the United Colonies of New England, where it included all slaves. It was

[1] Page 632, 2d Opinion.

[2] The Act here referred to is probably the Act of August 2, 1813, as the Act of July 14, 1798, proceeded to assess and collect the quotas at once without waiting for the states to assume quotas and assess and collect themselves.

[3] Page 583, 1st Opinion.

only relinquished in the Confederation and Perpetual Union in favor of the rule of values of the land because of inability to compromise on the inclusion of slaves, and the rule of values being so easily evaded by the several states the rule of numbers was restored by the resolutions of April 18, '83, unanimously, because it could not be evaded and was enforceable in practice; agreement being reached on the inclusion of three-fifths of the slaves. The great question was not on the measure of quotas, but on the right to quotas, whether they were voluntary contributions from the several states or not, and though by the constitutional law and theory of the Confederation the several states were obliged to contribute, yet the law of the Confederation could not be enforced; and quotas could not be obtained until power to administer quotas to the inhabitants of the states was conferred, along with power to administer all the powers of the old Congress to the inhabitants of the states, by the constitutional convention.

Moreover, as direct taxes are to be apportioned among the states according to numbers, they cannot be such as are inherently incapable of being apportioned. But only gross sums can be apportioned. Such were the taxes in all the acts for direct taxation and in the case supposed by the Court in the quotation above. A tax described as a tax extending one and undivided throughout the Union and laid on property and incomes, being a percentage of the value thereof, cannot be apportioned among the states without losing its quality of unity throughout the Union in being apportioned; and moreover losing its relation to property and incomes; because quotas are single sums which can be charged nowhere but on single bodies, as the states, and are gross sums that can have no relation to property or incomes until they are assessed and thus distributed on the property or incomes within the states; which latter function of assessment the Court implied the states

have the right to in the first instance, the right of Congress being only to assess and collect in non-complying states, as in the Jersey plan. *A fortiori* it is true that no taxes on property or incomes can be apportioned according to numbers, for such taxes can be measured only by the standard of values which is a wholly different standard from numbers; only quotas considered as sums in gross can be measured according to numbers. The Court would change the whole nature of the tax in order to apportion it among the states according to numbers, and thus would make it over into what is, properly speaking, a direct tax—that is, as they say, "the quota of each state." The Court really deny to Congress power to lay taxes throughout the United States on real or personal property or incomes; and, according to some language, they would seem—adopting the economic or commercial definition of direct taxes—to deny power to lay any but duties on consumption, duties on imports and excises, and perhaps stamp duties (and perhaps stamp duties should be limited to stamps on legal papers, for such only were they in colonial days); so the Court would limit Congress as did the Jersey plan; yet not on account of the states, but for wholly different reasons.

But it may be submitted that the object of taxation was always the political bodies, the members of the Union, and the matter of taxes was always a political matter, there being no consideration of economic or commercial matters, save as incidental to political ends; nor is there any consideration of natural persons as objects of taxation. There is no consideration of wealth, except slaves, which are not denominated wealth but are called "persons of the other description," looking forward to the period of the removal of the restriction on the prohibiton of their importation; and slaves were considered in both representatives and direct taxes only as means to the direct objects, the several states, and as the

measure of their contributions. The error would seem to lay in ignoring that the convention conferred on Congress the power vested in Congress by the Confederation to require quotas from the several states, and added power to lay and collect the same from the inhabitants.

THE LIMITS OF THE UNION.

Prior to 1823 it would appear there was no occasion for the United States to brave Europe with proclaiming the limits of the United States, otherwise than as set forth; President Washington had issued his farewell warning against entangling alliances, to preserve America for Americans; but in that year the colonies of Spain in south America being in revolt and apprehension having been aroused of the interference of the allied powers of Europe, the Holy Alliance, President Monroe announced the Monroe doctrine, so-called, that "as it was impossible for the Powers to extend their system to any part of America without endangering our peace and happiness we should not behold such interference with indifference"; and that "it was a principle that the American continents were henceforth not to be considered as subjects for future colonization by any European power." This doctrine appears more explicable on the ground that the colonies referred to were within the limits of the United States than merely out of political sympathy with an alien race so remote, and while the people of the United States were so few in number—some 10,000,000. The doctrine was immediately popularized into "America for Americans." The executive has maintained it since, and the Venezuela message of President Cleveland announced that this government was practically sovereign on the western continent, thus carrying into execution the constitutional sovereignty originating with the Declaration of Independence. By the

Constitution all the words of the name "the United States of America" are of equal import, yet in current conception the latter words have been neglected or used with little meaning, as if importing only the address of the United States, as if it were the United States located in America. The cause of the shrinkage of conception would appear to lay, as in the case of the power of Congress and also the meaning of direct taxes, in considering only what was practical at the time, in compromising with the several states so far as practicable; and the latter would preferably confine the Union to territory whereover the several states might be supreme, for otherwise it was questionable to whom among the several states should outlying territory ultimately belong.[1] [2]

OF THE POWER OF INTERPRETATION.

The inauguration of President Jefferson meant the ascendency of the states' rights party or school, the party of the federal plan in the convention, in the executive, and the Federalist political party being also out of power in Congress, the judiciary was resorted to to maintain the supremacy of the United States. It has always been recognized that President Adams intended by the appointment of Chief Justice Marshall to perpetuate the national supremacy and principles, and it is stated in the history of the Supreme Court of the United States[3] that Chief Justice Marshall and President Jefferson stood face to face as John Doe v. Richard Roe in the case of Marbury v. Madison.[4]

[1] This was the controversy in the case of the old Northwest Territory.

[2] Accordingly Porto Rico and Cuba would be within the limits of the United States. So may be the Hawaiian Islands, since a main reason for annexation was their strategical necessity as an outpost for our shore-line, which reason is stronger if our shore-line embraces America. But the Philippine Islands are beyond the limits of the Union.

[3] Carson's History of the Supreme Court of the United States.

[4] When Mr. Madison, secretary of state, refused to deliver to Marbury, justice of the peace, in the District of Columbia, his commission, after he had been appointed by President Adams, confirmed by the senate, and his commission signed and sealed during the Adams's administration, the supreme

By that case the conclusive supremacy of the United States over the several states, which could not be maintained by the Confederation and Union for lack of power to administer and execute the power of Congress, was instituted and begun. It was begun by the judiciary, and on the authority of that case was the reliance of the advocates of the national supremacy and principles placed. Here, it may be repeated, was the beginning of the administration of the supremacy of the United States over the several states, which constitutionally had obtained from the Confederation article obligating the several states to abide by the determinations of the United States in Congress. It was accomplished by the judiciary declaring themselves to have the right to interpret the Constitution conclusively. By Marbury v. Madison the interpretation of the Constitution by Congress so as to confer on the judiciary original power to issue the writ of mandamus to Mr. Madison was denied and overruled, and though this decision relieved the judiciary from issuing the writ and thus offering an issue to the President, yet to decide that to the judiciary belonged the interpretation of the Constitution was in effect to decide that it did not belong to the legislative or to the executive in any conclusive sense. Thereafter, by the authority of that case, neither the legislative nor the executive could conclusively interpret the Constitution; and during the time of Chief Justice Marshall the judicial interpretation was for the supremacy of the United States over

court was moved for a rule of mandamus to Mr. Madison to deliver the same, and denying the motion the court put their decision on the ground that they had no original jurisdiction in such a case, notwithstanding it was conferred on them by act of Congress, because original jurisdiction in such a case was not conferred on the court by the Constitution. Refusing to accept from Congress power to issue the writ, by denying the power of Congress to confer on them the power to do so, collision which was pending with the first administration of the states' rights party, under President Jefferson, was avoided, by determining that to the judiciary rather than to the legislative or executive belonged the interpretation and construction of the Constitution; and, as Story on the Constitution says, the national sense acquiesced Marbury v. Madison, 5 U. S.; 1 Cranch, 137.

the several states and was the reliance of the national party.[1] In the time of Chief Justice Taney it was otherwise, but so thoroughly were the national principles committed to the judiciary in the time of Marshall that the conclusive interpretation of the judiciary was not shaken by the inclination of the judiciary to the federal theory of the constitutional convention, in the time of Taney. *Yet if the right of the judiciary conclusively to interpret the Constitution should come to conflict with the maintenance of the supremacy of the United States over the several states, then if the supremacy of the United States could not be withheld the right of the judiciary conclusively to interpret the Constitution must give way.* This was the issue presented by the secession of South Carolina.

South Carolina passed the act of secession from the Union in convention of the people thereof, convened December 17, '60, pursuant to call of the general assembly of the state. The act was entitled "An act to dissolve the Union between the State of South Carolina and other states united with her under the compact entitled 'the Constitution of the United States of America,'" and declared that the ordinance *ratifying* the Constitution and all acts or parts of acts of the general assembly *ratifying* amendments to it were repealed, and that the Union subsisting between South Carolina and other states under the name of the United States of America was thereby dissolved.[2]

Here was an act of a state which must be negatived by the United States, by an interpretation of the Constitution contradicting it, which being the

[1] While the National party relied on the judiciary it naturally sought to extend their jurisdiction. If Congress had only particular powers the judiciary had a more extended jurisdiction than if Congress had general power. Therefore the National party was led to acquiesce in Congress having only particular powers. Such interpretation of the Constitution strengthened the National power by means of the judiciary.

[2] South Carolina only ratified the government of the Union made by the Union. She became a state by authority of the Union by the Declaration of Independence, and by authority and direction of Congress established her first constitution for internal government and police. It appears that she never existed but by and for the Union as well as herself.

supreme law of the land would by necessary consequence render it null and void. Until that was done no coercion by force of arms could be exercised within the state of South Carolina, or such coercion would be against a state and its authority, power wherefor the constitutional convention postponed after adopting the negative on state laws in order to avoid it, and never conferred. When that was done no law of South Carolina would confront the United States and the laws of the United States could be executed within the state of South Carolina, pursuant to the Constitution, with force of arms. But according to Marbury v. Madison, and the judicial precedents for sixty years, in order to be conclusive the negative must be exercised by the judiciary. But that would require among other things delay, and it was as imperative that the negative be at once as that it be at all. It should be exercised as promptly as the South Carolina convention enacted the law. But the judiciary could exercise it only upon a case arising at law or in equity and conducted to judgment, and execution issued, which would of necessity occasion delay. Moreover what form of action at law or suit in equity could be brought to interpret the Constitution of the United States to negative the act of the state? An action might perhaps be brought wherein the Constitution would be so interpreted, but what action for that purpose? Who should bring it? In South Carolina federal officers all resigned, actuated perhaps by the official opinion of the attorney-general of President Buchanan that the federal government could not act against a State except with an execution upon a judgment rendered in an action at law or suit in equity by the judiciary. South Carolina assumed possession of the United States custom-house. All the difficulty, delay, circuity, inconclusiveness, the inadequacy of any remedy at law or in equity, the inefficiency and inappropri-

ateness of the judiciary to the constitutional issue were present. Moreover the judiciary just then held that the constitutional obligations of the several states were only *moral* obligations. March 14, '61, after the act of secession of South Carolina, but prior to its execution by the firing on Fort Sumter, the Supreme Court of the United States decided the *ex parte* Matter of the Commonwealth of Kentucky by its governor, petitioner, vs. the governor of Ohio.[1] It was an application for a mandamus to the governor of Ohio to cause a fugitive from justice, convicted in Kentucky for enticing away a slave and fleeing to Ohio, to be delivered up for removal to Kentucky; and the Supreme Court in an opinion by Chief Justice Taney declared the governor of Ohio to be in duty bound to deliver up the fugitive to be removed to Kentucky, but further declared his duty to be not mandatory or compulsory but merely declarative of the moral duty of the compact, the Constitution. As its members were then, the supreme court might have let the Union be dissolved. President Buchanan had taken similar position in a late message to Congress. That President Lincoln feared the judiciary is evident from his inaugural address wherein he argued to restrict the binding authority of the opinions and decisions of the supreme court on the executive to the close limits of *res adjudicata*, that being no doubt all it was expedient for him to avow, in view of the practice of the government. Therefore judicial interpretation to negative the act of South Carolina and authorize the execution of the laws of the United States by force of arms within South Carolina was impracticable by reason of the mode of operation of the judiciary, lacking initiative and promptitude and certainty, and by its latest decision. Of the legislative and executive, both having been denied the conclusive interpretation of the Consti-

[1] 65 U. S., 24 How., pp. 66-110.

tution, perhaps either could exercise it to negative the act of South Carolina, as well as the other, at this time; and the South had threatened to secede if Mr. Lincoln was elected, thus perhaps assuming the election of the executive to decide the issue of pre-eminence in the government. If the President interpreted the Constitution to negative the act of South Carolina his interpretation was either conclusive or it was not. If not, if it was reversible by the judiciary, he might be in violation of the laws of the United States in the use of coercion by force of arms and liable to impeachment and punishment according to law. But not to exercise coercion by force of arms would permit and allow secession and the dissolution of the Union, which *in the opinion of the executive* was unconstitutional. President Lincoln chose to exercise the negative on the act of South Carolina himself, by the executive, and interpreting the Constitution so as to contradict the act of secession and thus render it null and void, he called for troops to *suppress an insurrection within* the state of South Carolina and other states. Here his act was either conclusive of the interpretation of the Constitution or it was not. If it was not, but was reversible by the judiciary then the Union could not be preserved pursuant to the Constitution because force of arms was constitutionally postponed to the writ of execution upon a judgment rendered in an action at law or suit in equity by the judiciary interpreting the Constitution to negative the act of South Carolina;[1] and President Lincoln was liable to impeachment and further punishment. If conclusive, the executive had the right conclusively to interpret the Constitution to negative acts of secession.[2] But such power belonging to the executive *What became of the*

[1] In accordance with the opinion of President Buchanan's attorney-general, whereon was based his message to Congress.

[2] As the British executive exercised the negative on the several colonies directly.

authority of the judiciary conclusively to interpret the Constitution? [1]

The supremacy of the United States inhering in the Declaration of Independence and expressed in the Confederation and Union by the article obligating the several states to abide by the determinations of Congress was begun as matter of administration by the judiciary by Chief Justice Marshall, and as matter of execution consummated by the executive by President Lincoln, it would appear; and the national sense acquiesced in both cases. To President Lincoln the issue of supremacy presented was official, direct, immediate and certain; to Chief Justice Marshall it would appear at this day to have been none of these. By as much as to the executive the greater issue was offered, its decision would appear to be the greater precedent. The judiciary and executive were established to administer and execute the power of Congress by the Confederation, that being the chief work of the constitutional convention; and the judiciary began and the executive completed the work, each assuming for the purpose conclusively to interpret the constitution.[2] Thus was accomplished the motive leading to their institution. The next work of the constitutional convention would appear to have been, according to the national plan, to enlarge or interpret the power of Congress by the Confederation to power to provide for the common defense and general welfare of the United States. For this purpose power conclusively to interpret the Constitu-

[1] All the biographers of Mr. Lincoln, while disputing over his technical qualifications as a lawyer, speak of the extraordinary strength and length of his reasoning power as exhibited at the bar, of his independence in its exercise, and of his absorbed and abiding interest in political questions, which meant constitutional questions during the period preceding the war. The result of his reasoning appears only when, having argued against the judiciary instead of for them, as his predecessor had done, the Chief Executive became the chief expounder of the Constitution.

[2] It should be noted distinctly that it was to establish the supremacy of the United States rather than to control other departments of the government thereof that the judiciary and the executive assumed conclusively to interpret the Constitution.

tion to *provide for the common defense and general welfare* would in the nature of things belong to Congress, as by the Confederation.[1]

[1] An examination of Madison v. Marbury would appear to show that all the objections to the conclusive interpretation of the Constitution by the legislative apply also to conclusive interpretation by the judiciary, both being upon oath. The argument that legislative interpretation repugnant to the Constitution is void, applies equally to render judicial interpretation contrary to the Constitution void. The Confederation and Union, the several state constitutions and the several colonial charters, and the many great charters of England were all *written* constitutions. Montesquieu had said, "Of the three powers above mentioned, the judiciary is in some manner next to nothing; there remains therefore only two." Since then their term had been made during good behavior with fixed compensation, to render them independent of the legislative and executive, but it would not follow that they were to have the conclusive interpretation of the Constitution, save for the supremacy of the United States over the several states, although it enabled them to assume it. It might mean that Congress was no longer to entertain appeals of cases from the judiciary. The trial of impeachments was denied to the judiciary, which according to Blackstone was the highest judicial power.[2] No doubt some of the members of the convention believed in the right of the judiciary to overrule the legislative interpretation, to the extent of the few cases which had then arisen. (See Carson's History of the Supreme Court of the United States.) To others the doctrine was not new, for when mentioned one member said, opposing it, "The justiciary of Arragon became by degrees the law-giver." The convention made no provision concerning the number of members of the Supreme Court or for contesting therein the supremacy of the United States. The functions of the legislative had always been the enactment of new law and the declaration of old law, and it would appear the judiciary assumed the latter function for constitutional purposes for the supremacy of the Union. The principle that adopted laws are adopted with the construction put on them was affirmed by Marshall, C. J., later, and no reason appears for its not applying to the supremacy clause of the Constitution, drawn from the interpretation of the Confederation by Congress.

[2] Judicial power to try impeachments was given by the Virginia plan, the resolutions of the committee of the whole, and the Jersey plan, but was striken out by the convention in convention unanimously. It appeared in the rough draft of the Constitution from the Pinckney draft, was postponed by the convention August 27th, then with all the postponed parts of the Constitution, was referred to a committee of one member from each state, August 31st; September 4th that committee reported a clause "That the Senate of the United States shall try all impeachments, but no person shall be convicted without concurrence of two-thirds of the members present." which clause was postponed, but taken up September 8th, and passed in following form: "The Senate of the United States shall have power to try all impeachments, but no person shall be convicted without concurrence of two-thirds of the members present; and every member shall be on oath." That the Chief Justice should preside was inserted by committee of revision of style and arrangement.

IN CONCLUSION.

Thus it would appear that according to the national interpretation the Constitution confers on Congress power to provide for the common defense and general welfare of the United States, and therefor power to lay and collect taxes directly from the several states, and duties extending throughout the United States, which are indirect taxes to the several states; and that the limits of the United States are the bounds of America; which interpretation the nation may accept and dictate in the future as the several states dictated their interpretation in the past.

By holding in the Income Tax cases that there has been a "Century of Error" the Supreme Court would appear to have opened the way to such interpretation.

To a British statesman has been attributed the saying that "As the British constitution is the most subtile organism which has proceeded from progressive history, so the American constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man." But it may be submitted that the American Constitution instead of being struck off at a given time was drawn from the British constitution and from the first American constitution in substance and in form, and however the British constitution may preserve the equilibrium of the governments of Great Britain, the Constitution of the United States of America was designed to preserve the great principle of self-government general and local, joint and several, for the people of America.[1]

[1] It may be observed that Mr. Madison, publishing his Journal of Debates, and Mr. Yates, publishing his Minutes, were not friendly to the national cause, and the same is true of Luther Martin's Letter and the David Brearly papers. None of the private accounts of the proceedings of the convention appears to have been written by a friend of the national cause. Moreover one of the standing rules of the convention was that nothing spoken in the House be published or communicated without leave, which injunction of secrecy, it is stated, was never afterward revoked and was faithfully observed by the members of the convention. Wherefore the Journal, Acts and Proceedings are not only the best evidence, but perhaps the sole evidence for the national cause, of what took place in the convention.

We[1] *the people of the United States in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of* [**co-equal with**] *America.*

ARTICLE I.

SECTION I.

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION II.

The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

Representatives [**from the several States**] and direct taxes [**to the several States**] shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New

[1] This copy of the Constitution is from Elliot's Debates, (J. B. Lippincott Edition, 1896,) which states that its copy is "copied and carefully compared with the original in the Department of State. Punctuation, paragraphs, and capital letters, same as said original." The words in brackets and black letter type are interpolated by the writer for interpretation.

Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the representation from any State, the Executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their Speaker and other officers; and shall have the sole power of impeachment.

SECTION III.

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be, into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation or otherwise, during the recess of the Legislature of any State, the executive thereof may make temporary appointments, until the next meeting of the Legislature, which shall then fill such vacancies.

No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no vote unless they be equally divided.

The Senate shall choose their other officers, and also a President *pro-tempore*, in the absence of the Vice President or when he shall exercise the office of President of the United States.

The Senate shall have sole power to try all impeachments: when sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried the Chief Justice shall preside: and no person shall be convicted without the concurrence of two thirds of the members present.

Judgment in cases of impeachment shall not extend farther than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SECTION IV.

The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December unless they shall by law appoint a different day.

SECTION V.

Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each house may provide.

Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one-fifth of those present, be entered on the journal.

Neither House, during the Session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

SECTION VI.

The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time: and no person holding any office under the United States shall be a member of either House during his continuance in office.

SECTION VII.

All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose, or concur with, amendments, as on other bills.

Every bill which shall have passed the House of Representatives, and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted,) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION VIII.

The Congress shall have power To lay and collect taxes, duties, imposts, and excises, [power] to pay the debts and [power to] provide for the common defence and general welfare of the United States; but all duties, imposts and excises [being indirect taxes to the several States] shall be uniform throughout the United States;[1]

[1] In the edition of 1819 the clause "to pay the debts" etc., is a separate paragraph beginning with a capital "T," thus: The Congress shall have power to lay and collect taxes, duties, imposts, and excises;

To pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

To borrow money on the credit of the United States,

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the supreme court;

To define and punish piracies and felonies committed on the high seas and offences against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

To provide for organizing, arming and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;—And

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

SECTION IX.

The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not

be prohibited by the Congress prior to the year eighteen hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of *Habeas Corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or *ex post facto* law shall be passed.

No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

No tax or duty shall be laid on articles exported from any State.

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another: nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the Treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States, and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

SECTION X.

No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law; or law impairing the obligation of contracts; or grant any title of nobility.

No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

SECTION I.

The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected as follows:

Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more then one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose, by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall, in like manner, choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes the Senate shall choose from them by ballot the Vice-President.

The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed or a President shall be elected.

The President shall, at stated times, receive for his services, a compensation, which shall neither be increased or diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation: *"I do solemnly swear [or affirm] that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."*

SECTION II.

The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: But the Congress may by law vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION III.

He shall from time to time give to the Congress information of the state of the Union, and recommend to their con-

sideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and, in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION IV.

The President, Vice-President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

SECTION I.

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

SECTION II.

The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; to all cases———affecting ambassadors, other public ministers, and consuls;———to all cases of admiralty and maritime jurisdiction;———to controversies to which the United States shall be a party;———to controversies between two or more States;———between a State and citizens of another State;———between citizens of different States;———between citizens of the same State, claiming lands under grants of different States, and between a State or the citizens thereof, and foreign States, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State

where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION III.

Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

ARTICLE IV.

SECTION I.

Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SECTION II.

The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.

A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

No person held to service or labor in one State under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION III.

New States may be admitted by the Congress into this Union [**within the limits of America**]; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislature of the States concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

SECTION IV.

The United States shall guaranty to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE V.

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided, that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI.

All debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution, as under the confederation.

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States shall be bound, by oath or affirmation, to support this constitution: but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

The ratification of the conventions of nine states, shall be sufficient for the establishment of this constitution between the States so ratifying the same.